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No. _____

In The
Supreme Court of the United States

THOMAS J. SPARGO, JANE MCNALLY, and PETER KERMANI,

Petitioners,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, Individually and as Administrator of the State Commission on Judicial Conduct and HENRY T. BERGER, Individually and as Chairperson of the New York State Commission on Judicial Conduct,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States District Court for the Northern District of New York in a comprehensive and well-reasoned decision held that Sections 100.1, 100.2(A), 100.5(A)(1)(c), (d), (e), (f), (g), and 100.5(A)(4)(a) of the New York State Rules of Judicial Conduct (App., pp. 102, 117-19) were, on their face, unconstitutional infringements of core First Amendment freedoms. On review, the Second Circuit, ignoring well established precedent of the United States Supreme Court and numerous Federal Circuits, and deciding a question this Court expressly left open in *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982), invoked the doctrine of *Younger* abstention. It did so despite the fact that two of the three litigants were not, nor could be party to the pending state proceeding and were thus without an opportunity to have their constitutional claims heard.

The questions presented for review are:

1. Should *Younger* abstention apply to a First Amendment challenge to a state judicial disciplinary code where individuals challenging that code are not and may not be parties to the pending state administrative proceeding and are thus deprived an opportunity to have their federal claims timely decided?

2. Should *Younger* abstention apply to a First Amendment challenge to a state judicial disciplinary code which is flagrantly and patently unconstitutional and in conflict with this Court's recent decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)?

PARTIES TO THE PROCEEDINGS

Petitioners are Thomas J. Spargo, Justice of the Supreme Court for the Third Judicial District of the State of New York, Jane McNally, and Peter Kermani. Respondents are the New York State Commission for Judicial Conduct, Gerald Stern, individually and in his capacity as Administrator of the State Commission on Judicial Conduct, and Henry T. Berger, individually and as Chairperson of the New York State Commission on Judicial Conduct.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions Involved	1
Statement	2
Procedural History and District Court Decision	3
The Court of Appeals Decision	5
Reasons For Granting The Petition	6
I. McNally and Kermani Are Without A Fair Or Sufficient Opportunity To Have Their Constitutional Claims Decided By A Competent Tribunal And *Younger* Abstention Is Therefore Inappropriate	7
II. Abstention Was Improper As The Challenged Provisions Were Flagrantly And Patently Violative Of Express Constitutional Prohibitions Under *Republican Party of Minnesota v. White*	21
Conclusion	30
Appendix Index	
Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003)	App. 1
Spargo v. N.Y. State Comm'n on Judicial Conduct, 2003 U.S. Dist. LEXIS 7073 (N.D.N.Y., Apr. 29, 2003)	App. 42

TABLE OF CONTENTS – Continued

Page

Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y., Feb. 20, 2003)..... App. 56

22 NYCRR §100 et seq. (Rules of the Chief Administrator of the Courts Governing Judicial Conduct)..... App. 97

TABLE OF AUTHORITIES

Page

FEDERAL CASES

ACLU of Fla. v. The Fla. Bar, 744 F. Supp. 1094 (N. D. Fla. 1990) 25

Ackerson v. Kentucky Judicial Retirement and Removal Commission, 776 F. Supp. 309 (W. D. Ky. 1991) 23

Ankenbrandt v. Richards, 504 U.S. 689 (1992) 8

Beal v. Stern, 184 F.3d 117 (2d Cir. 1999) 26

Benavidez v. Eu, 34 F.3d 825 (9th Cir. 1994) 20

Beshear v. Butt, 863 F. Supp. 913 (E. D. Ark. 1994) 25

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 16

Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993) 25

Casa Marie v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) 14

Cedar Rapids Cellular Telephone v. Miller, 280 F.3d 847 (8th Cir. 2002) 12

Central Arizona Water Conservation District v. United States EPA, 990 F.2d 1531 (9th Cir. 1993) 17

Citizens for a Better Environment, Inc. v. Nassau County, 488 F.2d 1353 (2d Cir. 1973) 13

City of Houston v. Hill, 482 U.S. 451 (1987) 22

City of Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750 (1988) 26

Colorado v. River Water Conservation District v. United States, 424 U.S. 800 (1976) 8, 15

Deakins v. Monaghan, 484 U.S. 193 (1988) 15

TABLE OF AUTHORITIES – Continued

Page

Dombrowski v. Pfister, 380 U.S. 479 (1965) 16, 22

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ..... *passim*

Dow Jones and Company, Inc. v. Simon, 842 F.2d 603 (2d Cir. 1988) 17

Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978) 13

Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 26, 29

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 27

Gibson v. Berryhill, 411 U.S. 564 (1973) 9, 20

Grayned v. City of Rockford, 408 U.S. 104 (1972) 26, 27, 29

Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001) 14, 15

Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) 29

Hawaiian Housing Authority v. Midkiff, 467 U.S. 229 (1984) 15

Hicks v. Miranda, 422 U.S. 332 (1975) 10, 11

Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) 16

Illinois v. Telemktg. Associates Inc., 538 U.S. 600 (2003) 26

Juidice v. Vail, 430 U.S. 327 (1977) 9

Kolender v. Lawson, 461 U.S. 352 (1983) 27, 28

Kugler v. Helfant, 421 U.S. 117 (1975) 20

Lamont v. Postmaster General, 381 U.S. 301 (1965) 17

TABLE OF AUTHORITIES – Continued

Page

Lovell v. Griffin, 303 U.S. 444 (1938) 29

Meredith v. Oregon, 321 F.3d 807 (9th Cir. 2002) 15

Middlesex County Ethics Commission v. Garden State Bar Ass'n, 457 U.S. 423 (1982) ..... *passim*

Morial v. Judiciary Commission, 565 F.2d 295 (5th Cir. 1977) 13

NAACP v. Button, 371 U.S. 415 (1963) 16, 25

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868 (3d Cir. 1981) 14

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 15, 22

New York Mag. v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998) 26

Procunier v. Martinez, 416 U.S. 396 (1974) 17

Public Utilities Commission of Ohio v. United Fuel Gas Company, 317 U.S. 456 (1943) 22

Quackenbush v. Allstate Insurance Company, 517 U.S. 706 (1996) 15

Renne v. Geary, 501 U.S. 312 (1991) 25

Republican Party of Connecticut v. Tashijian, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986) 23

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) ..... *passim*

Republican Party of Minnesota v. White, 247 F.3d 854 (8th Cir. 2002) 18

Richards v. Jefferson County, 517 U.S. 793 (1996) 3, 7, 8, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Stovall, 646 F.2d 1087 (5th Cir. 1981)..... 12, 13

Roe v. Wade, 410 U.S. 113 (1973)..... 13, 17

Saia v. New York, 334 U.S. 558 (1948)..... 29

Schneider v. State, 308 U.S. 147 (1939)..... 29

Septum, Inc. v. Keller, 614 F.2d 456 (5th Cir. 1980)..... 13

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)..... 29

Smith v. Goguen, 415 U.S. 566 (1974)..... 28

South Central Bell Telephone Company v. Alabama, 526 U.S. 160 (1999)..... 11

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1976)..... 26

Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003)..... 1, 7, 14, 18, 21

Staub v. City of Baxley, 355 U.S. 313 (1958)..... 29

Steffel v. Thompson, 415 U.S. 452 (1974)..... 13, 20

The Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000)..... 17

Thornhill v. Alabama, 310 U.S. 88 (1940)..... 26

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973)..... 17

Warth v. Seldin, 422 U.S. 490 (1975)..... 17

Wooley v. Maynard, 430 U.S. 705 (1977)..... 13, 14

Younger v. Harris, 401 U.S. 37 (1971)..... *passim*

Zwickler v. Koota, 389 U.S. 241 (1967)..... 22

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. §1254 1

42 U.S.C. §1983 1

STATE STATUTES

22 NYCRR §100 *et seq.* ..... *passim*

MISCELLANEOUS

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 21

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Thomas J. Spargo, Jane McNally, and Peter Kermani, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 9, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals (App., pp. 1-41) is reported at 351 F.3d 65 (2d Cir. 2003). The opinion of the District Court granting petitioners' motion for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 (App., pp. 56-96) is reported at 244 F. Supp. 2d 72 (N.D.N.Y. 2003). The opinion of the District Court denying the respondents' motion for a stay pending appeal (App., pp. 42-55) is unreported.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on December 9, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . . " The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " The pertinent provisions of the New York State Rules of Judicial Conduct codified in Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York are reprinted in an appendix to this petition (App., pp. 97-133).

STATEMENT

This case raises critically important issues of federalism and due process, as they relate to the doctrine of abstention established in the seminal case of *Younger v. Harris*, 401 U.S. 37 (1971). The Second Circuit Court of Appeals, invoking the *Younger* abstention doctrine, reversed the United States District Court's determination that specific provisions of the New York State Code of Judicial Conduct were unconstitutional on their face, and directed dismissal of the petitioner's federal Complaint. In so doing the Second Circuit erroneously adopted a position in clear conflict with long-standing jurisprudence of this Court on abstention and due process, as well as that of the First Circuit, Third Circuit, Fifth Circuit, Eighth Circuit, and Ninth Circuit Courts of Appeal and decided an issue expressly left open by this Court in *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). The Second Circuit invoked the doctrine of abstention despite the fact that two of the petitioners, Jane McNally and Peter Kermani were not, and could never be, party to the state administrative proceeding conducted by the respondents concerning petitioner Spargo. McNally and Kermani were thus without opportunity for their federal claims to be heard absent access to a federal forum.

The Second Circuit also failed, in determining the applicability of *Younger*, to consider the flagrant and patent unconstitutionality of the challenged provisions in light of this Court's recent decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which also militated against abstention.

This holding, if permitted to stand, would expand the *Younger* doctrine beyond any reasonable boundaries necessary to preserve notions of equity, comity, and federalism and stand in stark contrast to precedent from this Court and other Circuits. It would, instead, turn *Younger*

abstention into a mechanism for abrogating the due process rights of those with constitutional claims recognized by this Court in *Richards v. Jefferson County*, 517 U.S. 793 (1996), and its progeny.

The Second Circuit's holding also undermines this Court's recent opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), by deferring to a state administrative proceeding determination of the constitutionality of provisions of the sort which this Court has already determined to be violative of core First Amendment freedoms.

This writ should be granted to reconcile this clear conflict raised by the Second Circuit's decision expanding the reach of the *Younger* abstention doctrine, and to preserve the integrity of the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

Procedural History and District Court Decision

The petitioners commenced a federal action in the United States District Court for the Northern District of New York on October 17, 2002 seeking declaratory and injunctive relief to invalidate Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the New York State Code of Judicial Conduct (hereinafter the "Code") (App., pp. 102, 117-19) as unconstitutional violations of their rights under the First and Fourteenth Amendments to the United States Constitution. (App., pp. 3, 58). At the time of the commencement of this action, Justice Spargo was the subject of an administrative proceeding before the respondent New York State Commission on Judicial Conduct ("Commission") brought pursuant to the challenged code sections for, among other things, his participation in the Florida recount as an observer for the Bush/Cheney campaign, speaking at a Conservative Party dinner in Monroe County, New York, distribution of token items such as donuts and coffee while campaigning for a Town Judgeship, and for alleged improper payment to several

campaign workers during his election campaign for New York State Supreme Court Justice. (App., pp. 67-72).

Although Justice Spargo was a sitting Supreme Court Justice and therefore subject to the administrative processes of the Commission, petitioners McNally and Kermani were private citizens. Jane McNally was a retired public service employee who had been active in democratic party politics throughout her life. (App., p. 57). Peter Kermani, was the chairperson of the Albany County Republican Party. (App., pp. 57-58). Justice Spargo's federal Complaint challenged as constitutionally infirm in light of *White,* Code provisions the Commission invoked related to his campaign and judicial activities.

McNally and Kermani asserted independent individual claims arising from the chilling effect on their rights of free speech and political association, created by the Code. Their claims, while in part precipitated by their inability to engage in First Amendment protected activities with Justice Spargo, reached well beyond that as the challenged Code provisions impacted their other independent political activities and contacts. (App., pp. 75-76). They had refrained from associating with and supporting judges and judicial candidates other than Justice Spargo because of the pending disciplinary charges against him (App., pp. 9-10).

The District Court, rejecting the Commission's request to abstain, reached the merits and found the challenged Code provisions facially invalid as unconstitutionally vague prior restraints on speech violative of fundamental First Amendment freedoms. In doing so, the District Court expressly held abstention inappropriate as to McNally and Kermani as they are "not judges or judicial candidates and therefore are not subject to the Commission's authority [and] their constitutional claims cannot be determined in the Commission proceeding . . . " (App., p. 75). The District Court recognized that McNally and Kermani each articulated individual constitutional claims,

independent from those of Justice Spargo, that the challenged Code provisions "chill their individual speech and association and are therefore unconstitutional." (App., p. 75).

The District Court's analysis then turned to the constitutional validity of the challenged Code provisions and it found that Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) constituted, on their face, a prior restraint on protected speech, noting, *inter alia*, this Court's recent decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). (App., p. 82).

As for Sections 100.1 and 100.2(A), which set "directives" to preserve an honorable, independent, and impartial judiciary, the District Court found these provisions to be void on their face for vagueness. (App., pp. 91-94). In light of these findings the District Court granted the petitioners a permanent injunction restraining the respondents from enforcing Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the Code of Judicial Conduct appended to the New York Judiciary Law as set forth in the rules of the Chief Administrator of the Courts in Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York. (App., pp. 94-95).

The District Court reiterated its holding in a decision of April 29, 2003 denying the respondents' motion for a stay of the permanent injunction pending resolution of the appeal filed with the United States Court of Appeals for the Second Circuit on March 7, 2003. (App., pp. 42-55).

The Court of Appeals Decision

The United States Court of Appeals for the Second Circuit reversed the District Court but not on the merits of the First Amendment claims raised by the petitioners. Instead it instructed the District Court to abstain from exercising jurisdiction based on the doctrine articulated in

Younger v. Harris, 401 U.S. 37 (1971). Significantly, the Court expressly stated its decision "should not be read as revealing any view on the merits of plaintiffs' claims." (App., p. 41).

Despite acknowledging that neither McNally nor Kermani were party to nor could have been party to the state administrative proceeding, and therefore were without opportunity in that forum to have their federal claims heard, the Court of Appeals erroneously determined that their legal claims were "largely the mirror image" of Spargo's First Amendment challenge, "unavoidably intertwined and inseparable." (App., p. 38). Significantly, the Court of Appeals, albeit in a footnote, acknowledged that invoking the *Younger* abstention doctrine as against McNally and Kermani flew in the face of established precedent. Nevertheless, without legal reasoning or explanation, the Court of Appeals disregarded that precedent saying simply that "we believe in the particular circumstances before us, that *Younger* need not be read so restrictively." (App., p. 40 n.21). However, in failing to read *Younger* "so restrictively", it expanded the *Younger* doctrine beyond anything defensible in abstention jurisprudence, abrogated the due process rights of McNally and Kermani, and decided an issue expressly left open by this Court in *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). (App., pp. 40-41).

REASONS FOR GRANTING THE PETITION

This Petition must be granted to reconcile the obvious conflict between the Second Circuit Court of Appeals and this Court as well as other Circuits with respect to the applicability of *Younger* abstention to parties who are not and may not be party to the subject state proceeding and determine for the Circuits the question left open in *Middlesex County*. In directing the District Court to abstain,

the Second Circuit also ignored and, in the process, undermined the holding of this Court in *Republican Party of Minnesota v. White*. The express dictates of the *White* holding demonstrate the challenged Code provisions are flagrantly and patently unconstitutional.

Thus, the Court must entertain this writ to prevent an unwarranted expansion of the *Younger* abstention doctrine, resolve the conflict among the Circuits, and to preserve the integrity of its own decision in *White*.

I. McNALLY AND KERMANI ARE WITHOUT A FAIR OR SUFFICIENT OPPORTUNITY TO HAVE THEIR CONSTITUTIONAL CLAIMS DECIDED BY A COMPETENT TRIBUNAL AND *YOUNGER* ABSTENTION IS THEREFORE INAPPROPRIATE

The decision of the Second Circuit Court of Appeals in *Spargo v. New York State Commission on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003) (App., pp. 1-41), is dramatic and extraordinary in its scope. Put in its simplest terms, the Second Circuit has held that *Younger* abstention applies in circumstances where a litigant is not party to a state proceeding and does not even have the ability to intervene or participate in that proceeding. Such an extension of the *Younger* doctrine is a radical departure from this Court's jurisprudence on the subject, as well as holdings of various other Circuit Courts of Appeal. Its effect would expand *Younger* impermissibly into a basis for suspending due process rights of federal litigants. *See*, *Richards v. Jefferson County*, 517 U.S. 793 (1996).

To hold that a litigant seeking to press his or her constitutional rights in a federal court may not because of a pending state proceeding to which they neither are nor may be a party abrogates the recognized due process rights of a party to have his or her own day in court. This

is true even when unrelated parties shared "essentially identical" interests. *Richards*, 517 U.S. at 796.

As this Court held in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992),

> [I]t is axiomatic . . . that 'abstention from the exercise of federal jurisdiction is the exception, not the rule.' *Colorado v. River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). Abstention rarely should be invoked because the Federal Courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' *Id.* at 817.

Ankenbrandt, 504 U.S. at 705. Nowhere could this principle be more apt than in the setting where a litigant seeking redress of fundamental First Amendment rights in a federal court is not a party to, nor able to intervene in a pending state court action. To do so would be to turn notions of federal state comity, not to mention notions of due process of law, inside out.

The Second Circuit flagrantly disregards precedent when it, in offhanded conclusory fashion, finds the claims of all three petitioners "interrelated" to justify abstention. (App., p. 5). While it is true the claims of all three arise from First Amendment challenges to the Code, and are in that way related, they are not interrelated in the fashion which the other Courts of Appeals or this Court have recognized as meriting abstention. In fact, precedent is to the contrary, as no case law exists where it has been determined that legally distinct parties, unrelated by some type of privity, unable to intervene in the pending state proceeding, are so "intertwined" that *Younger* abstention is merited as to non-parties.

A review of the opinion reveals that the Second Circuit failed to provide any reasonable explanation for how McNally and Kermani would have their federal claims heard given the undisputed fact that "neither was a party to the pending disciplinary proceeding against Spargo, or

otherwise subject to the Commission's authority . . . " (App., pp. 10-11). Seeking to ignore rather than provide a sound legal basis, the Second Circuit opinion appears to hold that the required "opportunity to fairly pursue their constitutional claims in the ongoing state proceedings," *id.* citing *Juidice v. Vail*, 430 U.S. 326, 387 (1977); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), need not be applied "in a mechanical fashion" (App., p. 33) and in any event, at least as to McNally "she was subpoenaed to testify before the Commission . . . " (App., p. 39 n.20). This, according to the Second Circuit in a footnote, was apparently sufficient "opportunity" for McNally. They lack even this weak argument as to Kermani's opportunity to be heard.

In particular, the Second Circuit's determination flies in the face of this Court's decision in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) where the Court expressly held that when a federal plaintiff is not a party to the state proceeding, a mere commonality of interest with a party to the state proceeding is not sufficient to justify abstention. *Id.* at 930-31.

In *Doran*, three bar owners sought federal court intervention to enjoin a local ordinance prohibiting topless dancing. Although two of the bars had complied with the ordinance, and were not subject to a state proceeding, the third owner had not and was being prosecuted in state court for an alleged violation. *Doran*, 422 U.S. at 924-25. The Supreme Court nevertheless held that *Younger* did not bar federal action by the two plaintiffs who could face prosecution despite that the plaintiffs shared virtually identical interests:

> We do not agree . . . that all three plaintiffs should automatically be thrown into the same hopper for Younger purposes[.] . . . We cannot accept that view, any more than we can accept petitioner's equally Procrustean view that because [the plaintiff subject to prosecution] would have

> been barred from injunctive relief had it been the sole plaintiff [the other two plaintiffs] should likewise be barred not only from injunctive relief but from declaratory relief as well. While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case; – *while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management*. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

Id. at 928-29 (emphasis supplied).

The case of *Hicks v. Miranda*, 422 U.S. 332 (1975), relied upon by the Second Circuit in its decision, does not alter this analysis. In fact, the Second Circuit's analysis and application of that case are flawed. In *Hicks*, the Court held the interests of those parties before the state court were intertwined with others who were not a party. However, it did so based on proof that the named individuals were employed by the non-parties. The non-parties were also owners of copies of the alleged pornographic film which had been seized by the local authority and had recourse to seek return of the seized films *in the pending state proceeding*. *See Hicks*, 422 U.S. at 348-49.

Thus, while the Court found an intertwining of interests, it did so in a vastly different setting than here. The non-parties were in a relationship of privity with those party to the pending state proceeding, and had recourse themselves to become involved in the state court proceeding to seek return of their property. This clearly distinguishes *Hicks* from the matter before the Court, demonstrating its holding is *not* a basis for abstention.

McNally and Kermani are individuals not in privity with Justice Spargo, and are totally powerless to intervene in the state proceeding. To find the *Hicks* holding counsel's abstention is to overlook these significant differences.

To suggest that McNally and Kermani should be barred from the federal court because of the administrative proceeding, also flies in the face of fundamental principles articulated by this Court that absent extraordinary circumstances, each party is entitled to their own day in court. The mere existence of litigation brought by other parties with similar interests does not bar a plaintiff from pursuing his or her own claims. Long recognized due process rights are to the contrary.

Establishing exactly this point in *Richards v. Jefferson County*, 517 U.S. 793 (1996), the Court held that although three plaintiffs challenging a state tax represented "essentially identical" interests to distinct individuals who brought a subsequent challenge to the tax, (*id.* at 796), the latter group of plaintiffs was denied due process when it was barred from asserting its claims due to the earlier litigation. *Id.* at 802. Because the plaintiffs in the suit before the Court were "best described as mere 'strangers' to one another," the court was "unable to conclude that the [earlier] plaintiffs provided representation sufficient to make up for the fact that petitioners neither participated in, nor had the opportunity to participate in, the [earlier] action." *Id.* at 802.

Subsequent Supreme Court jurisprudence has reinforced the proposition that suits brought by parties with similar interests do not preclude subsequent plaintiffs from instituting their own litigation, even though they are aware of prior cases and share a lawyer with earlier plaintiffs. *South Central Bell Telephone Company v. Alabama*, 526 U.S. 160 (1999). Unless there was "privity or some other special relationship between the two sets of plaintiffs," the latter group could not be bound by the earlier judgment. *Id.* at 168. Therefore, this Court rejects

any notion that the mere fact that a litigant in another case represented "essentially identical" interests poses a bar to a separate plaintiff pursuing his or her own cause of action.

Neither does due process condone preclusion of a plaintiff's claim, even if he or she could have intervened in a state proceeding. As the *Richards* court explained, "the general rule is that the law does not impose upon any person absolutely entitled to hearing the burden of voluntary intervention in a suit to which he is a stranger." *Richards*, 517 U.S. at 800, n.5.

The various Circuits have followed this reasoning in determining that even where a party may intervene in a pending State court proceeding, *Younger* abstention does not apply where individuals with their own claims are not party to the state proceeding.

For example, in *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 847 (8th Cir. 2002), the Eighth Circuit Court of Appeals, citing to *Doran,* found that while *Younger* abstention applied to Cedar Rapids Cellular and Davenport Cellular, two of three parties seeking federal court intervention, it could not preclude access to the federal courthouse of an independent company, WWC. Although WWC's interests were generally aligned with those of Cedar Rapids Cellular and Davenport Cellular, the latter two shared common corporate ownership. WWC had no such relationship with them. *Id.* at 882.

In *Robinson v. Stovall*, 646 F.2d 1087 (5th Cir. 1981), the Fifth Circuit, in another decision at right angles to the Second Circuit's holding, found that the District Court erred in concluding that *Younger* abstention applied to plaintiffs subject to but who had not yet been arrested, pursuant to a local ordinance. In that matter, a group of individuals, some which had been arrested and some which had not, brought a federal action to challenge the constitutionality of a town ordinance requiring permits and proscribing the manner in which public protests could be conducted. In finding that the non-arrested plaintiffs

had a right to federal court review notwithstanding *Younger* abstention, the Fifth Circuit held:

> A person threatened with, but not yet the subject of, an alleged illegal arrest, and prosecution or other violations of his Federal rights may seek appropriate injunctive and declaratory relief without any obstacles from the *Younger* doctrine. [Citing] *Steffel* [*v. Thompson*], 415 U.S. [452,] 461-62 [(1974)]; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 [(1975)]; *Wooley v. Maynard*, 430 U.S. 705, 709-11 [(1977)]; *Roe v. Wade*, 410 U.S. 113 [(1973)]; *Septum, Inc. v. Keller*, 614 F.2d 456, 460-61 [(5th Cir. 1980)], *cert. denied*, [449 U.S. 992 (1980)]; *Ealy v. Littlejohn*, 569 F.2d 219 [(5th Cir. 1978)]; *Citizens For A Better Environment, Inc. v. Nassau County*, 488 F.2d 1353, 1361 (2d Cir. 1973).

Robinson, 646 F.2d at 1090. Acknowledging that adjudication of the non-arrested plaintiffs' claims could result in a declaratory judgment that the ordinance did not pass constitutional muster with obvious collateral estoppel effect on pending state prosecutions, the Court nevertheless found that *Younger* abstention was not appropriate as to the non-parties. "*Younger* principles are not invoked by the mere fact that federal relief has an impact upon state governmental machinery." *Id.* at 1091 (quoting *Morial v. Judiciary Commission*, 565 F.2d 295, 299 (5th Cir. 1977)). "[N]either a common interest in the outcome of federal litigation or a common effort in pressing it requires abstention as to all plaintiffs." *Robinson*, 646 F.2d at 1091.

The Second Circuit Court of Appeals all but acknowledged that it was departing from generally accepted principles adopted by other Circuits in finding abstention appropriate as to McNally and Kermani, noting that the First Circuit as well as the Third Circuit have held that "*Younger* can only be applied to third-party plaintiffs whose interests are closely aligned with the state court litigant if the third-party plaintiffs can intervene in the state court proceeding to protect their interests . . . " (App.,

p. 40 n.21). The cases referenced are that of *Casa Marie v. Superior Court of Puerto Rico*, 988 F.2d 252 (1st Cir. 1993) and *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868 (3rd Cir. 1981).

In *Casa Marie*, the First Circuit noted:

> [T]he Supreme Court has intimated that *Younger* abstention might not apply in some instances to a federal plaintiff who was not a party, or not 'closely related' to a party, in the pending state court proceeding.

Casa Marie, 988 F.2d at 266. Similarly, the Third Circuit in *New Jersey-Philadelphia Presbytery*, referencing this Court's decision in *Wooley v. Maynard*, 430 U.S. 705, 710 (1977), acknowledged "that a federal forum is available to litigants threatened with violations of federally protected rights and not presently parties to a state court proceeding." *New Jersey-Philadelphia Presbytery*, 654 F.2d at 882.

The Ninth Circuit in contrast to the Second Circuit holding in *Spargo*, also recognizes that *Younger* abstention is simply inappropriate where federal plaintiffs are not a party to the pending state court litigation. In *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001), a District Court judgment of abstention was reversed and remanded where plaintiffs were not a party to pending state court litigation. This was so despite their right to intervene in the state court litigation.

In *Green*, plaintiffs sought a declaration that an Arizona statute requiring consent of a neighboring town for incorporation was unconstitutional. The District Court dismissed the case on *Younger* abstention grounds because the federal plaintiffs could have but did not intervene in pending state court proceedings. *Id.* at 1090-92. In reversing, the Ninth Circuit held that Supreme Court jurisprudence on abstention has,

> informed us that, although there are limited circumstances in which such abstention by

> federal courts is appropriate, those circumstances are 'carefully defined' and 'remain the exception, not the rule,' [citing] *New Orleans Public Service, Inc. v. Counsel of the City of New Orleans*, 491 U.S. [350, 359 (1989)] (quoting *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229, 236 [(1984)]), and that as a general matter, 'the Federal court's obligation to adjudicate claims within their jurisdiction [is] virtually unflagging' *Id.* (quoting *Deakins v. Monaghan*, 484 U.S. 193[, 203] (1988)); *see* also, *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706, 716 [1996]; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976).

Green, 255 F.3d at 1089. The Ninth Circuit held that even though there were plaintiffs who shared interests with those pressing a pending state court action, the plaintiffs' interests were not intertwined and did not "come within the *Younger* exception to the general rule that non-parties to a state court action are entitled to litigate their own claims in federal as in state court." *Green*, 255 F.3d at 1104. The Court went on to hold that:

> *Younger* abstention, as the Supreme Court has so often repeated, is a circumscribed exception to the overarching rule that the federal courts must exercise the jurisdiction granted to them by Congress under the Constitution. Our decision today restores our circuit's *Younger* jurisprudence to the careful boundaries delineated by the Supreme Court.

Id. See also, Meredith v. Oregon, 321 F.3d 807, 818 (9th Cir. 2003).

It is submitted that this writ must be granted so that the Second Circuit's *Younger* jurisprudence can be returned to the careful boundaries delineated by the Supreme Court.

The Second Circuit, in an apparent attempt to minimize the rights of McNally and Kermani, and justify the

outcome, states in conclusory fashion that McNally and Kermani "do not assert independent First Amendment rights" (App., pp. 3-6), and questioned, without deciding, their standing to bring the claims. (App., p. 37 n.19). This rationalization ignores the fact supported by sworn statements from McNally and Kermani that "each assert individual claims that the challenged sections of the Rules chill their individual speech and association and are therefore unconstitutional." (App., p. 75). Their legal rights are not simply derivative of the rights of Justice Spargo or other judges to speak and act, but arise from the impact of the unconstitutional code provisions *on their independent speech, associational, and political freedoms.* The record is clear that each "refrained from associating with and supporting other judges and judicial candidates . . . " (App., p. 37 n.19). Consequently, it is not possible to assert they lack independent First Amendment rights.

Moreover, the law demonstrates that each has standing to bring this federal challenge. "The Supreme Court has consistently relaxed normal standing requirements in [F]irst [A]mendment cases." *Hirschkop v. Snead*, 594 F.2d 356, 363 (4th Cir. 1979). In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court held:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statutes in existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Id. at 615. *See also, Dombrowski v. Pfister,* 380 U.S. 479, 486-87 (1965); *NAACP v. Button*, 37 U.S. 415, 432-33 (1963). Regardless of the Second Circuit's dicta contained in a footnote, the law is well settled and McNally and Kermani have standing and should have been permitted access to federal court. "When a governmental prohibition or restraint imposed on one party causes specific harm to a

third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. 490, 505 (1975), citing *Roe v. Wade*, 410 U.S. 113, 124 (1973); *see, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 684-690 (1973) (student group challenged regulations applicable to railroads because the regulations resulted in adverse environmental impacts on the natural resources and negatively impacted the group); *The Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3rd Cir. 2000) (the college newspaper challenged restrictions placed on business regarding the content of advertisement because prohibition on advertisements was a cause of a decrease in paper's advertising revenue); *Central Arizona Water Conservation District v. United States EPA*, 990 F.2d 1531, 1537-39 (9th Cir. 1993) (water districts challenged the EPA final rule regulating emissions where water districts were obligated to pay a portion of the cost of the generating stations emissions control costs). Thus, the mere fact that McNally and Kermani are not directly regulated by the Code is of no moment in analyzing their standing.

Moreover, numerous examples of the right of recipients to receive speech are reflected in our jurisprudence. *See, Procunier v. Martinez*, 416 U.S. 396 (1974) (censorship of prison inmates mail infringes the rights of the recipients to receive mail); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (citizens have a right to receive communist political publications). "Throughout all these cases the First Amendment unwaiveringly protects the right to receive information and ideas." *Dow Jones and Company, Inc. v. Simon*, 842 F.2d 603, 607 (2nd Cir. 1988).

It is submitted *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), is controlling on this point. As in the instant matter, plaintiffs included not only a judicial

candidate, but also his supporters, individual voters, as well as various political parties. In reversing, the Supreme Court declined to address the standing issue. The only inference to be drawn is that the Court agreed that the non-candidate plaintiffs had established standing.

Notably, when *White* was before the United States Court of Appeals for the Eighth Circuit, the Court rejected the defendant's argument that the non-candidate plaintiffs lacked standing, arguments identical to those suggested in the Second Circuit's footnote. *See*, *Republican Party of Minnesota v. White*, 247 F.3d 854, 861 n.6 (8th Cir. 2002). The Eighth Circuit held that

> the plaintiffs have alleged more than the subjective 'chilling' of their free speech rights. . . . [the judicial candidate] and the other plaintiffs have stated they were unable to associate with each other at political party gatherings and alleged they would have done so absent the ethical restrictions. Deprivation of the right to associate with others politically is a cognizable 'injury in fact'. . . . Because the plaintiffs' associational injuries are fairly traceable to Cannon 5 and the injunctive relief they request will redress them, the plaintiffs have standing to assert their claims.

Id.

In light of the foregoing it is clear McNally and Kermani have standing.

The Second Circuit with its *Spargo* decision has also, in conclusory fashion and without analysis, answered a question left open by this Court in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), a case heavily relied upon in justifying their decision. The resolution, however, is one which limits access to federal courts in a manner not supported by *Younger* or its progeny, and stands in contradiction of *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

A review of the *Middlesex* decision reveals that it does not support abstention in this case in any event. In fact, the question of standing as to the parties like Kermani and McNally was not even before the Supreme Court. In that case, rather than respond to charges leveled in accordance with New Jersey Bar disciplinary procedures, the individual against whom the charge was issued and three bar organizations filed a federal action charging that the disciplinary rules were facially vague and overbroad. *Middlesex*, 457 U.S. 429. Although the District Court abstained, a divided Third Circuit reversed finding that the State Bar disciplinary proceedings did not provide a meaningful opportunity to adjudicate the constitutional claims. *Id.* at 429. The Supreme Court thereafter accepted the case for review and articulated a three factor test to determine if *Younger* abstention applied:[1]

> [F]irst, do the state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, was there an adequate opportunity in the state proceeding to raise constitutional challenges.

Id. at 432. The Court answered each question in the affirmative on the facts of the case presented.

Of critical importance, however, is that abstention was ordered as to the individual party to the state proceeding,

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[1] It is critical to note that the New Jersey Supreme Court had heard oral argument on the attorney's constitutional challenges and adopted rules allowing interlocutory appeals of constitutional challenges during the administrative process while the case was pending in the United States Supreme Court. Those are also critical factors in distinguishing the instant matter. *See Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 436 n.15 (1982).

with the Court noting that the question of his opportunity to have his constitutional claims heard was put to rest by a subsequent action of the New Jersey Supreme Court in entertaining his constitutional claims. The Court expressly stated that it was making no determination as to the propriety of abstention as to the "respondent organizations who are not parties to the state disciplinary proceedings," a question which was not before it. *Id.* at 437 n.17. *Middlesex* thus left open the question of abstention as to non-parties such as Kermani and McNally. Thus, it is virtually without relevance to the question of abstention as to McNally and Kermani. However, the Second Circuit, erroneously, has chosen to answer that question in a manner which closes the door to federal court. In doing so it has contradicted *Doran* which is in point and controlling.

Dismissal of a federal suit on abstention grounds "naturally pre-supposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973); *see, also Kugler v. Helfant*, 421 U.S. 117, 124 (1975) ("the policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights."); *Steffel v. Thompson*, 415 U.S. 452 (1974) (holding that the plaintiff, who was not himself subject to prosecution, could seek to enjoin enforcement of a criminal trespass ordinance even though his companion was being prosecuted); *Benavidez v. Eu*, 34 F.3d 825, 832 (9th Cir. 1994) (holding that "*Younger*'s scope is closely circumscribed to parties actually involved in state litigation," and, therefore, *Younger* did not bar the suit of a plaintiff whose lawyer was involved as amicus in a state proceeding concerning similar claims). The respondents are unable to point to a single case from this or any other Circuit where abstention was invoked where a party to the federal proceeding was not

party to, or able to intervene in the pending state action. The decision of the Second Circuit in so holding is out of step with case law and establishes a dangerous precedent that risks turning *Younger* into a vehicle for denying due process rights and access to a federal forum.

It is beyond dispute that no state court proceeding was ongoing to which petitioners McNally or Kermani were or could be a party. To deny them access to the Federal court and the relief which, on the merits, Judge Hurd of the Northern District found they were entitled, has the practical effect of extinguishing their federal claims. *Younger* does not require, nor does it support such an outcome. "[O]ne of the strengths of our Federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served where the federal half of the protection is crippled." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977).

To correct this misapplication of *Younger* and rectify this conflict with jurisprudence of this Court and numerous Circuits, the writ of certiorari must be granted.

II. ABSTENTION WAS IMPROPER AS THE CHALLENGED PROVISIONS WERE FLAGRANTLY AND PATENTLY VIOLATIVE OF EXPRESS CONSTITUTIONAL PROHIBITIONS UNDER *REPUBLICAN PARTY OF MINNESOTA v. WHITE*

Another critical point counseling the importance that this Court review the erroneous decision in *Spargo* is that while the Circuit Court ordered the District Court to abstain, that directive came only after the District Court had reached and addressed the merits of petitioners' constitutional claims. In a lengthy and scholarly opinion, Judge Hurd held that the challenged provisions of the Code were facially unconstitutional as prior restraints of

protected speech and unduly vague, contravening long-standing First Amendment jurisprudence including this Court's recent decision directly on point. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

Younger abstention is inappropriate in situations such as this where a challenged state statute is "flagrantly and patently violative of express constitutional prohibitions. . . . " *Younger*, 401 U.S. at 53-54. *See also, New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 366-67 (1989); *Public Utilities Commission of Ohio v. United Fuel Gas Company*, 317 U.S. 456, 469 (1943) (the Supreme Court upheld an Order of the District Court enjoining the State Public Utilities Commission from attempting directly to regulate interstate gas prices because such actions were "on their face plainly invalid").

As an initial matter, the Supreme Court has "been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987). In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), it was held that "abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression." *Id.* at 489-90. "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself affect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

In the matter before the Court, a facial challenge was made under the First Amendment to select provisions of the Code of Judicial Conduct. The District Court, citing to the massive amount of First Amendment jurisprudence counseling that statutory schemes virtually identical to the New York State Code are violative of core rights and freedoms bestowed by the Constitution, struck down the provisions as a prior restraint and as unduly vague. (App., pp. 83-94). There can be no question in light of this

analysis as well as this Court's recent holding in *Republican Party of Minnesota v. White* that the Code is flagrantly and patently violative of the First Amendment to the United States Constitution. As such, *Younger* abstention is not appropriate, and in fact, this Court must exercise jurisdiction to protect the integrity of its own decisions.

The Code provisions at issue, and challenged by Justice Spargo, McNally, and Kermani in the federal action, prohibit fundamental forms of political speech and association that no construction could save from constitutional invalidity. New York State Supreme Court Justice is an elective office. Many of the charges against Justice Spargo arise from his campaign or political activities. "It is axiomatic that candidates for elected office do not lose the protection of the First Amendment when they choose to run in a political race." *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309, 313 (W. D. Ky. 1991). Indeed, "the notion that the special context of electioneering justified an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (emphasis in original).

"Freedom of association confers a right to join with others to pursue activities independently protected by the First Amendment. Because political advocacy and participation in partisan politics are lodged at the heart of the First Amendment, freedom of association necessarily includes a right of political association." *Republican Party of Connecticut v. Tashijian*, 770 F.2d 265, 278 (2nd Cir. 1985), *aff'd*, 479 U.S. 208 (1986). "Freedom of association therefore is to be protected as a fundamental component of our personal liberty." *Id.* at 277. Likewise, speech about the qualifications of candidates for public office is central to recognized First Amendment freedoms. *See White*, 536 U.S. at 781.

The Second Circuit relies heavily on this Court's decision in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), to support its erroneous exercise of *Younger* abstention. Initially, as already discussed, this decision clearly left open the question of abstention as to parties such as McNally and Kermani who were not party to the State administrative proceeding, *Middlesex*, 457 U.S. at 437 n.17, which the Second Circuit has decided in a way that impermissibly broadens *Younger* abstention and bars federal cases despite the absence of an opportunity for non-parties to be heard. Moreover, *Middlesex* is sufficiently distinct from the matter at hand on the fundamental constitutional questions, so as to be of little guidance. Significant distinctions exist between the New Jersey Code at issue in that case and the New York Code at issue here. In fact, a review of *Middlesex* and the code at issue underscores the flagrant unconstitutionality of the New York Code provisions.

Unlike the New York Code, the New Jersey Code afforded procedural protections to ensure meaningful consideration of constitutional challenges. Specifically, the New Jersey Code expressly provided a vehicle for raising constitutional claims. Rule 1:20-2(j) provided:

> All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board. . . .

Id. at 426 n.2. Moreover, the New Jersey Code permitted a writ of interlocutory appeal of constitutional questions during the administrative proceeding. *Id.* at 431 n.9. No such procedural protections exist in the New York Code and only add to the flagrant unconstitutionality counseling against abstention.

"'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . their First Amendment rights that attach to their roles.'" *White*, 536

U.S. at 788, quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting). Indeed, where a State has made the decision to popularly elect its trial judges, as New York has done, it must recognize that with that decision comes the right of the judicial candidates to express their viewpoints to the public and moreover that the public has a right to know. *See, ACLU of Fla. v. The Fla. Bar*, 744 F. Supp. 1094, 1098 (N. D. Fla. 1990) (temporarily enjoining defendants from enforcing certain provisions of the Florida rules governing judicial conduct on First Amendment grounds). In *ACLU of Florida*, the Court analogized to the situation once barring attorney advertising, noting that if the advertising was misleading, the proper remedy was more information not less. *Id.* at 1098. The same reasoning holds true for the public charged with the right to elect judges.

The "principle of impartial justice under law [does not mean a] state is free to circumscribe [judicial candidates and judges'] freedom of speech by a rule so sweeping that only complete silence would comply with a literal, which is also so far as it appears the intended and the reasonable, interpretation of the rule." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993) (declaring invalid a provision of the Illinois code of judicial conduct as violative of the First Amendment).

The flagrantly unconstitutional Code provisions effect a total and uncompromising ban on the free expression and free association of judges and judicial candidates, such as Justice Spargo. They are overly broad, and a far cry from the "narrow specificity" required of limitations on First Amendment rights. *NAACP v. Button*, 371 U.S. 415, 433 (1963). While the State may have an interest in an impartial judiciary, the offending Code provisions bear no reasonable relationship to accomplishing this end. *Beshear v. Butt*, 863 F. Supp. 913, 917 (E. D. Ark. 1994) (invalidating State law as overly broad and impermissibly vague).

"Any government regulation that limits or conditions in advance the exercise of protected First Amendment activity constitutes a form of prior restraint, . . . and any such restraint comes 'bearing a heavy presumption against its constitutional validity.'" *See*, *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1120 (1st Cir. 1981), quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). As the District Court acknowledged, the Code provisions are, on their face, prior restraints on petitioners' First Amendment rights.

The precedent is legion, in various factual settings, declaring that statutes or regulations restraining free speech cannot survive constitutional scrutiny. "[U]nfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 757 (1988). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). *See*, *also, Illinois v. Telemktg. Assocs. Inc.*, 538 U.S. 600 (2003); *New York Mag. v. Metro. Transp. Auth.*, 136 F.3d 123 (2nd Cir. 1998); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999).

As the Supreme Court found in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), statutes that are unduly vague offend the Constitution in a number of ways.

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' . . . Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'

Id. at 108-109 (internal citations omitted).

Whether a given statute or Code provision is unduly vague is, in the first instance, a *sui generis* determination. However, a review of several cases detailing unconstitutionally vague language demonstrates that abstention was inappropriate given the flagrant unconstitutionality of the Code.

At issue in *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991) was statutory language which prohibited attorneys from making statements likely to prejudice an ongoing adjudicative proceeding, but provided a safe harbor provision stating that an attorney "may state without elaboration . . . the general nature of the . . . defense." *Id.* at 1048. The Court found this unduly vague for constitutional requirements because "[t]he lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.* at 1048-1049.

In *Kolender v. Lawson,* 461 U.S. 352 (1983), the Court was faced with a California statute requiring a person loitering on the streets to provide a "credible and reliable" identification when requested by a peace officer. *See, id.* at 356. As the *Kolender* court noted,

> [o]ur Constitution is designed to maximize individual freedoms within a framework of ordered

> liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. . . . As generally stated, the void for vagueness doctrine requires [a statute to have] . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. . . . Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'

Id. at 357-58, quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

The obvious risk when the Legislature fails to provide guidelines is that the offending statute may permit the agents charged with enforcement to pursue their "personal predilections" without regard to appropriate standards. *See Kolender,* 461 U.S. at 358, quoting *Smith,* 415 U.S. at 575. The court held the use of the terms "credible" and "reliable" impermissibly vague vesting "virtually complete discretion in the hands of the police", *Kolender*, 461 U.S. at 358, encouraging "arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

The offending Code sections are so imprecisely drawn that they fail to give a person of reasonable intelligence warning as to what conduct is being regulated. For example, Section 100.1 states that judges should maintain and enforce "high standards of conduct" to preserve the integrity and independence of the judiciary (App., p. 102). Yet nowhere is the term "high standards of conduct" defined. Section 100.2(A) requires judges to "promote the public

confidence in the integrity and impartiality of the judiciary", again without any elaboration or specificity. (App., p. 102). Section 100.5(A)(4)(a) mandates that incumbent judges and judicial candidates maintain the dignity "appropriate to judicial office". (App., p. 119). Nowhere is the type of conduct deemed "appropriate" defined. Further, Section 100.5(A)(1)(c) forbids "partisan political activity," (App., p. 117) while Section 100.5(A)(1)(g) prohibits attending "political gatherings". (App., p. 118). Neither of the latter two sections provide guidance and definition as to what is deemed "partisan political activity" or "political gatherings". Because of the poor draftsmanship of these Code provisions, incumbent judges and judicial candidates are left to guess at the meaning of these proscriptions, and are left to fall victim to subjective predilections as demonstrated above.

The ambiguity and vagueness contained in the Code may result in impermissible arbitrary enforcement by the Commission. *See Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1123 (1st Cir. 1981). Because the Code contains no direction or elaboration, the Commission is free to utilize its "unbridled discretion." *Id.* at 1123. "Similarly, in numerous other cases, [the Supreme Court] ha[s] condemned broadly worded [enactments] which grant such standardless discretion to public officials that they were free to censor ideas and enforce their own personal preferences." *Grayned,* 408 U.S. at 113, citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 149 (1969) ("public welfare, peace, safety, health, decency, good order, morals or conscience"); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (unbridled discretion vested in mayor and city council to grant or deny permission to organizations seeking to solicit new members from the general public); *Saia v. New York*, 334 U.S. 558 (1948); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939).

In light of this overwhelming precedent, there can be no question that the bar to political speech and expression imposed on judges and judicial candidates by the challenged Code provisions and the sweeping admonition to uphold the integrity of the office patently and flagrantly violate fundamental First Amendment freedoms. In such a setting, the doctrine of *Younger* abstention has no place.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 29, 2003 Decided: December 9, 2003)

Docket No. 03-7250, 03-7289

THOMAS J. SPARGO, JANE MCNALLY and PETER KERMANI,

Plaintiffs-Appellees-Cross-Appellants,

–v.–

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, individually and as Administrator of the State Commission on Judicial Conduct and HENRY T. BERGER, individually and as Chairperson of the New York State Commission on Judicial Conduct,

Defendants-Appellants-Cross-Appellees.

Before:

MINER, CALABRESI, and STRAUB, *Circuit Judges*.

Appeals and cross-appeal from the judgment of the United States District Court for the Northern District of New York (David N. Hurd, *Judge*), declaring various provisions of the New York Rules Governing Judicial Conduct facially unconstitutional and permanently enjoining defendants from enforcing the provisions. Because we find that *Younger* abstention applies to all of the plaintiffs' claims, we vacate the judgment and injunction of the District Court and remand with instruction to abstain.

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STRAUB, *Circuit Judge*:

Plaintiffs, Thomas J. Spargo ("Spargo"), an elected New York state judge, and two of his political supporters, Jane McNally ("McNally") and Peter Kermani ("Kermani"), bring First Amendment and Equal Protection challenges to three specific New York rules of judicial conduct:[1] (1) 22 N.Y.C.R.R. § 100.1 – which directs judges to maintain "high standards of conduct" to preserve "the integrity and independence of the judiciary;" (2) 22 N.Y.C.R.R. § 100.2(A) – which instructs judges to avoid the appearance of impropriety by "act[ing] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;" and (3) 22 N.Y.C.R.R. §§ 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) – which prohibit incumbent judges and judicial candidates from engaging in partisan political activities that are unrelated to their own campaign for judicial office and which require all judicial candidates to "maintain the dignity appropriate to judicial office."

After the New York State Commission on Judicial Conduct ("Commission"), the official agency responsible for enforcing New York's judicial conduct rules,[2] *see* N.Y.

[1] The judicial conduct rules are codified in Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York. The rules are also set forth in Part 100 of the Rules of the Chief Administrator of the Courts. For consistency, we adopt the same citation format as the District Court below and refer to the rules of judicial conduct "generally as the 'Rules' or specifically as '22 NYCRR § xx.'" *See Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 76 n.3 (N.D.N.Y. 2003).

[2] The Commission is composed of eleven appointed members representing lawyers, judges, and members of the public, each of whom

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Const. art. VI § 22, charged Spargo with five counts of judicial misconduct, plaintiffs filed suit under 42 U.S.C. § 1983, alleging that the judicial conduct rules at issue violated their First Amendment and Equal Protection rights and seeking to enjoin the Commission from proceeding with the pending disciplinary proceedings against Spargo or otherwise enforcing the challenged rules. Relying on the Supreme Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765, 768 (2002) (concluding that a Minnesota canon of judicial conduct that prohibited judicial candidates from announcing their views "on disputed legal or political issues" violated the First Amendment as a restriction on core political speech), the United States District Court for the Northern District of New York (David N. Hurd, *Judge*) declared 22 N.Y.C.R.R. §§ 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) facially unconstitutional and permanently enjoined defendants from enforcing the challenged provisions. *See Spargo v. N.Y. State Comm'n on Judicial Conduct,* 244 F. Supp. 2d 72, 92 (N.D.N.Y. 2003).

On appeal, defendants and *amici curiae* urge us to reverse the District Court on the merits, arguing that the challenged judicial conduct rules are narrowly tailored to serve the compelling state interest in preserving the reality as well as the appearance of judicial independence and impartiality. However, because state disciplinary

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serves a term of four years. The Governor of New York appoints four members of the Commission, the Chief Judge of the Court of Appeals appoints three members, and each of the four leaders of the State Legislature appoints one of the remaining four positions. All members of the Commission serve part-time without financial compensation. *See* N.Y. Const. art. VI § 22(b); N.Y. Jud. Law § 41(a).

proceedings were pending against Spargo at the time the federal suit was filed, this case raises the threshold question of whether the District Court should have abstained from exercising jurisdiction over the plaintiffs' suit in deference to the ongoing disciplinary proceeding. *See generally Younger v. Harris,* 401 U.S. 37, 44-45 (1971) (cautioning that federal courts should generally refrain from enjoining pending state court proceedings). Defendants accordingly focus their arguments on the question of who should have the first opportunity to decide the plaintiffs' constitutional claims, arguing that the pending state disciplinary proceeding provides Spargo with a fully adequate forum to raise his constitutional challenges and that principles of federalism and comity mandate that the District Court abstain from deciding Spargo's claims and the interrelated claims of co-plaintiffs McNally and Kermani.

Citing concerns as to whether Spargo could seek mandatory review of the Commission's decision before the New York Court of Appeals, the District Court declined to abstain from exercising jurisdiction over Spargo's claims under *Younger. See Spargo,* 244 F. Supp. 2d at 83-85. The District Court further found no basis to abstain from hearing the claims of McNally and Kermani, as neither was a party to the pending disciplinary proceeding against Spargo. *See id.* at 82. As we explain more fully below, because the New York Court of Appeals has subsequently confirmed that its review of the Commission's disciplinary decisions is mandatory, *see In re Raab,* 763 N.Y.S.2d 213, 215 (N.Y. 2003) (per curiam); *In re Watson,* 763 N.Y.S.2d 219, 223 (N.Y. 2003) (per curiam), erasing any doubt as to Spargo's ability to seek judicial review of his constitutional claims, and because the claims of all three plaintiffs are

inextricably intertwined, we hold that proper deference to New York's paramount interest in regulating its own judicial system mandates the exercise of *Younger* abstention over plaintiffs' claims. Accordingly, we vacate the judgment and injunction of the District Court and remand with instruction to the District Court to abstain from exercising jurisdiction over the plaintiffs' action.

Background

This case arises from an investigation involving plaintiff Thomas J. Spargo's potential violation of several judicial conduct rules. The Commission initiated the investigation into Spargo's campaign conduct and political activity in December 2000 while Spargo was serving as an elected Town Justice for the Town of Berne in Albany County, New York. While the investigation was pending, Spargo ran successfully for the position of Justice of the Supreme Court in the Third Judicial District of New York, the position which he currently holds. Eventually the Commission's investigation expanded to include allegations that Spargo authorized inappropriate payments of $5,000 to two political supporters.[3]

On January 25, 2002, the Commission served Spargo with a formal written complaint, charging Spargo with four counts of judicial misconduct. Charge I alleges that Spargo "failed to observe high standards of conduct . . . failed to act at all times in a manner that promotes public

[3] During the course of the pending investigation, Spargo was represented by counsel, testified four times, and was afforded the opportunity to submit materials in his own defense.

confidence in the integrity and impartiality of the judiciary . . . [and] failed to maintain the dignity appropriate to judicial office," in violation of 22 N.Y.C.R.R. §§ 100.1, 100.2(A), and 100.5(A)(4)(a), by offering items of value such as cider and donuts to induce voters to vote for him during his campaign for Town Justice. Charge II alleges that Spargo "failed to avoid impropriety and the appearance of impropriety and failed to act . . . in a manner that promotes public confidence in the integrity and impartiality of the judiciary," in violation of 22 N.Y.C.R.R. §§ 100.1 and 100.2(A), by accepting the Albany County District Attorney-Elect as a client in connection with the contested election for District Attorney, notwithstanding the fact that the District Attorney's office regularly appeared in criminal cases before Spargo as a sitting Town Justice. Charge II also alleges that Spargo violated N.Y.C.R.R. §§ 100.1 and 100.2(A) by presiding over criminal cases prosecuted by the Albany County District Attorney's Office without disclosing to defense counsel that Spargo had previously represented the District Attorney and that the District Attorney's campaign committee still owed Spargo $10,000 in legal fees.

Charges III and IV allege that Spargo violated 22 N.Y.C.R.R. §§ 100.5(A)(1)'s prohibitions on partisan political activity by: (1) attending "governmental sessions for the recount of presidential votes" during the November 2000 Florida recount as an observer for the Republican Party and the Bush/Cheney presidential campaign; (2) "participat[ing] in a loud and obstructive demonstration against the recount process outside the offices of the Miami-Dade County Board of Elections" in an attempt to disrupt the recount process; and (3) serving as the keynote speaker at the 39th Annual Monroe County Conservative

Party Dinner, a fundraising event for the Conservative Party.

On May 12, 2002, Spargo was served with a supplemental complaint charging him with additional violations of 22 N.Y.C.R.R. §§ 100.1, 100.2, and 100.5(A)(4)(a) for allegedly authorizing improper payments to two consultants involved in his campaign for Supreme Court Justice. The supplemental complaint charges that Spargo authorized his judicial campaign committee to pay McNally $5,000, although McNally "had agreed to volunteer her services [to Spargo's election campaign] without pay," for "consulting services" purportedly rendered on October 30, 2001, the same day that McNally nominated Spargo as the Democratic Party's candidate for Supreme Court Justice. Similarly, the supplemental complaint alleges that Spargo authorized a second $5,000 payment from his campaign committee "to Empire Strategy Consultants, the principal of which is Thomas Connolly, the Rensselaer County Independence Party Chairman and a delegate to the Independence Party Judicial Nominating Convention, after Mr. Connolly supported and worked for [Spargo's] nomination as the Independence Party candidate on October 8, 2001, notwithstanding that neither [Spargo] nor [Spargo's] campaign was legally obligated to pay any money to Mr. Connolly or to Empire Strategy Consultants."

In his answers to the Commission's complaints, Spargo asserted as an affirmative defense that his campaign activities were constitutionally protected and that the judicial conduct rules that he was charged with violating were overly broad and unduly vague in violation of the First Amendment as well as the Constitution of the State of New York. On July 12, 2002, the Commission

designated a referee to conduct a hearing and prepare a report on the misconduct charges.[4] *See* N.Y. Jud. Law § 43(2) (authorizing the Commission to appoint a referee to conduct hearings on judicial misconduct complaints). The hearing was scheduled for October 21-24, 2002. However, shortly before the hearing was to commence, Spargo unsuccessfully requested an adjournment.

On October 17, 2002, immediately following the denial of the adjournment and only four days before the disciplinary hearing was scheduled to begin, plaintiffs filed suit in federal court bringing facial and as-applied constitutional challenges to 22 N.Y.C.R.R. §§ 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a). In their complaint, plaintiffs assert that "[t]he purpose of this action is to obtain declaratory and injunctive relief," declaring the challenged rules of judicial conduct unconstitutional, "in violation of the First and Fourteenth Amendment[s] to the United States Constitution and Article I, §§ 8, 9, and 11 of the New York State Constitution." Plaintiffs also sought to obtain a permanent injunction barring defendants from pursuing the pending disciplinary charges against Spargo.

In support of their independent First Amendment claims, McNally and Kermani both allege that they have been adversely affected by the defendants' actions in pursuing judicial misconduct charges against Spargo. McNally alleges that "the threat of sanctions against Spargo" and other judicial candidates whom McNally may

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[4] For a more detailed explanation of the underlying facts, the development of the New York Code of Judicial Conduct, and the judicial disciplinary process, we refer readers to the District Court's thorough discussion at 244 F. Supp. 2d at 74-81.

support in the future "impedes her freedom of speech, including her ability and desire to nominate and show support for particular candidates as a delegate to future Democratic Judicial Nominating Conventions." Similarly, Kermani contends that he is "adversely affected because, as a member and chairman of the Republican Party, he is restrained from associating with Spargo out of concern that [the] association would adversely impact Spargo." Kermani also alleges that he "has declined to invite Spargo to address [the Republican Party], despite a desire to do so, out of concern that such activity would result in [additional] charges being brought against Spargo."

In expedited proceedings before the District Court, plaintiffs obtained a temporary restraining order barring the Commission from taking any further disciplinary action against Spargo. Deeming the matters in dispute to be strictly questions of law, the District Court consolidated the preliminary injunction hearing with a trial on the merits of plaintiffs' First Amendment and Equal Protection claims. On February 20, 2003, the District Court issued its order and decision, declaring the challenged judicial conduct rules facially unconstitutional and permanently enjoining defendants from enforcing the challenged rules. *See Spargo,* 244 F. Supp. 2d at 92.

In reaching its decision, the District Court acknowledged that "[t]here is 'a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.'" *Id.* at 82 (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982)). However, the District Court determined that *Younger* abstention did not extend to McNally's and Kermani's constitutional claims as neither was a party to the pending disciplinary

proceeding against Spargo, or otherwise subject to the Commission's authority, and McNally and Kermani would therefore have no opportunity to raise their claims in Spargo's disciplinary proceeding. *See id.* at 82-83. As for Spargo himself, the District Court determined that while the other prerequisites for *Younger* abstention were present, *Younger* did not apply because the pending disciplinary proceedings failed to provide Spargo with an adequate opportunity to raise his constitutional challenges. *See id.* at 85.

First, the District Court expressed concern that Spargo's constitutional claims would go unheard if the pending misconduct charges were found to be unsubstantiated or if the Commission declined to pursue the charges for other reasons. *See id.* at 83. Second, the District Court noted that it was unclear under state law, *see* N.Y. Jud. Law § 44(7),[5] whether Spargo could seek mandatory review of the Commission's disciplinary determination before the New York Court of Appeals or whether such review was discretionary. *See Spargo,* 244 F. Supp. 2d at 83-84.[6] Third, the District Court questioned whether

[5] Section 44(7) provides that "[a]fter a hearing, the commission may determine that a judge be admonished, censured, removed or retired [and] . . . [t]he judge involved may either accept the determination of the commission or make written *request* to the chief judge . . . for a review thereof by the court of appeals." N.Y. Jud. Law § 44(7) (emphasis added).

[6] In its decision, the District Court specifically recognized that the question of whether review of the Committee's disciplinary findings is mandatory or discretionary is a question of state law "more properly answered by the New York Court of Appeals." *Spargo,* F. Supp.2d at 84 n.9. However, lacking authority to certify the question to the Court of Appeals, the District Court felt compelled to reach the abstention

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"[c]onsideration of the validity of the [judicial conduct] Rules themselves is outside the scope of the Commission's authority despite any constitutional defense" that might be raised by a judge charged with violating the rules. *Id.* at 84. Finally, the District Court observed that the New York Court of Appeals would review "the [C]ommission's findings of fact and conclusions of law" based "on the record of the proceedings" before the Commission. *Id.* (quoting N.Y. Jud. Law § 44(9) with emphasis omitted). Noting that a disciplinary hearing is not the equivalent of a full trial, where the rules of evidence apply, and that the Commission need not provide extensive analysis in rejecting proffered constitutional defenses, the District Court worried that the resulting administrative record would be too "spare" and "scant" to permit adequate appellate review. *See id.*

On the merits of plaintiffs' claims, the District Court agreed that the judicial conduct rules restricting partisan political activity, 22 N.Y.C.R.R. §§ 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a), imposed a prior restraint on protected speech. *See id.* at 86-87. Relying heavily on the Supreme Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the District Court concluded that the rules were not narrowly tailored to serve the state's interest in maintaining and promoting an independent

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question based on the record provided by the parties. *Cf. Butler v. Ala. Judicial Inquiry Comm'n,* 245 F.3d 1257 (11th Cir. 2001) (certifying procedural questions to the Alabama Supreme Court to determine whether plaintiff could raise constitutional challenges to state canons of judicial ethics during the course of state disciplinary proceedings, thus satisfying the requirements for *Younger* abstention).

judiciary.[7] *See Spargo,* 244 F. Supp. 2d at 86-89. Although New York does not impose the same restrictions on judicial candidates,[8] the District Court reasoned that the challenged provisions of 22 N.Y.C.R.R. § 100.5 imposed even broader restrictions, "[e]ssentially . . . prohibit[ing] judges and judicial candidates from [engaging in] any political activity except their own judicial campaign." *Id.* at 88. The District Court further rejected defendants' argument that the political activity restrictions are narrowly tailored to advance the compelling state interest in preserving judicial independence, reasoning that judicial candidates may have been active in politics prior to seeking judicial office, and "[t]here is no support for the proposition that one-time participation in political activity," which the rules do not address, "impedes the making of independent judgments any less than current participation in some political

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[7] In *White,* the Supreme Court determined that a Minnesota provision prohibiting judicial candidates from announcing their views on disputed legal and political issues violates the First Amendment. *See White,* 536 U.S. at 788. The majority in *White* specifically noted "[t]here is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits." *Id.* at 787.

[8] Under New York law, judicial candidates may announce their views on disputed issues, as long as they avoid "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," and refrain from issuing "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." 22 N.Y.C.R.R. § 100.5(A)(4)(d)(i)-(ii). Plaintiffs do not contend that these provisions violate the First Amendment. *Cf. Watson,* 763 N.Y.S.2d at 224-26 (interpreting 22 N.Y.C.R.R. § 100.5(A)(4)(d)(i) and concluding that the judicial conduct rules' limited ban on pledges or promises survives First Amendment scrutiny).

activity." *Id.* The District Court also reasoned that judicial bias could be effectively remedied through voluntary recusal instead of broad restrictions on political speech and activity. *See id.* at 88-89.

As for 22 N.Y.C.R.R. §§ 100.1 and 100.2(A), which affirmatively direct judges and judicial candidates to observe "high standards of conduct" and act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary," the District Court held that both provisions were void for vagueness, because the provisions failed to give adequate notice of the specific activity prohibited and consequently were likely to chill protected activity. *See id.* at 90-91. Finally, although the District Court ruled for plaintiffs on their First Amendment challenge, it rejected plaintiffs' parallel equal protection claim, explaining that New York could impose special restrictions on the speech of judicial candidates, because "[j]udicial candidates and candidates for other public office are not similarly situated." *Id.* at 86.

The parties now appeal. Defendants argue that: (1) the District Court should have abstained from hearing plaintiffs' suit in deference to the pending disciplinary proceeding against Spargo, (2) plaintiffs McNally and Kermani lack Article III standing to bring independent constitutional claims because their allegations of injury are too conclusory, and (3) the District Court erred in analyzing the merits of plaintiffs' First Amendment challenge. Plaintiffs have filed a cross-appeal on the denial of their equal protection claim.

While the appeal was pending,[9] the New York Court of Appeals issued two decisions that erased any doubt as to the mandatory nature of its review of Commission disciplinary decisions. *See Raab,* 763 N.Y.S.2d at 215 (noting that the Commission's "determination is reviewable as of right"); *Watson,* 763 N.Y.S.2d at 223 (stating that "[p]etitioner appeals to this Court as of right"). Moreover, *Raab* and *Watson* confirm that judges and judicial candidates subject to disciplinary proceedings have the opportunity to raise First Amendment challenges before the Court of Appeals. *See Raab,* 763 N.Y.S.2d at 216-19 (distinguishing the Supreme Court's decision in *White* and concluding that the restrictions on partisan political activity contained in 22 N.Y.C.R.R. § 100.5(A)(1)(c)-(h) are narrowly tailored to address the state's compelling interests in preventing political bias and corruption and the appearance of such corruption); *Watson,* 763 N.Y.S.2d at 224-26 (considering but rejecting First Amendment challenge to 22 N.Y.C.R.R. § 100.5(A)(4)(d)(i)'s ban on the making of "pledges or promises" by judicial candidates).

We conclude that in declining to abstain under *Younger* the District Court placed too much weight on the uncertainty of state procedures for raising constitutional claims in disciplinary proceedings. In addition, we recognize that the Court of Appeals has subsequently clarified the scope of available review of constitutional challenges

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[9] After the District Court denied defendant's request for a stay pending appeal, *see Spargo v. N.Y. State Comm'n on Judicial Conduct,* 2003 WL 2002762 (N.D.N.Y. Apr. 29, 2003), this Court granted defendants' motion for an expedited briefing schedule and for a stay of judgment pursuant to FED. R. APP. P. 8(a)(2).

to the judicial conduct rules. While the opinions in *Raab* and *Watson* were not available at the time the District Court issued its decision, they now make explicit that plaintiffs have a sufficient opportunity to raise their constitutional claims during the course of state proceedings, and this precludes the District Court from exercising jurisdiction over a parallel action that seeks to disrupt the state proceeding. Finally, we find that abstention applies to the derivative claims of plaintiffs McNally and Kermani, as their First Amendment interests are inextricably intertwined with the First Amendment interests asserted by Spargo.

In deciding this case on abstention grounds, we are sensitive to the importance of the free speech issues raised on appeal and emphasize that our decision should not be read as revealing any view on the merits of plaintiffs' claims. As *amici curiae* point out, all fifty states have adopted codes of judicial conduct, containing provisions identical, or substantially similar, to the judicial conduct rules challenged in this case. Moreover, like New York, *see* N.Y. Const. art. VI §§ 6, 10, 12-13, 15-17, the majority of states in this country have adopted a system of judicial elections, raising potential concerns about how broadly the speech of elected judicial and judicial candidates may be restricted. *See White,* 536 U.S. at 790 (O'Connor, J., concurring). Accordingly, any ruling on the merits of plaintiffs' First Amendment challenge may have widespread influence and impact. That being the case, our ruling does not deny plaintiffs the opportunity to raise their constitutional challenge; we simply direct plaintiffs to the alternative state forum where proceedings have already begun. It is to the State Commission on Judicial Conduct and the New York Court of Appeals that plaintiffs

must make their arguments, and to which other interested parties must look, for further guidance and development of the law in the context of this controversy. Beyond that, the parties have available whatever review the Supreme Court opts to offer them. *Cf.* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance,* 78 N.Y.U.L. REV. 1293, 1303 (2003) (Madison Lecture).

Discussion

As a threshold matter, because defendants raise both standing and abstention concerns, and because we have an independent obligation to ensure that standing exists, *see N.Y. Pub. Interest Research Group v. Whitman,* 321 F.3d 316, 324-25 (2d Cir. 2003), we must determine whether we may decide the case on *Younger* grounds without confirming the existence of constitutional standing. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998), directs federal courts to resolve questions of Article III jurisdiction before reaching the merits of a plaintiff's claim. While dismissal or a stay of claims is mandatory when the requirements for *Younger* abstention are satisfied, *see Diamond "D" Constr. Corp. v. McGowan,* 282 F.3d 191, 197 (2d Cir. 2002), *Younger* is not a jurisdictional bar based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction grounded in equitable considerations of comity. *See, e.g., Benavidez v. Eu,* 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention is *not* jurisdictional, but reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses.") (emphasis in original); *Schachter v. Whalen,* 581 F.2d 35, 36 n.1 (2d Cir. 1978) (per curiam) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to

the jurisdiction of the federal district court as such to hear the case.").

Despite the prudential nature of the abstention inquiry, we may still proceed to decide a case under *Younger* without addressing the plaintiffs' constitutional standing to bring suit. As the Supreme Court clarified in *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584-85 (1999), *Steel Co.* does not mandate a strict "sequencing of jurisdictional issues," as it does not violate separation of powers principles to dismiss an action on a non-merits ground before finding subject-matter jurisdiction. Thus, while *Steel Co.* may bar the exercise of hypothetical jurisdiction to dismiss on the merits of a claim,[10] *Ruhrgas* reaffirms the inherent flexibility that federal courts exercise "to choose among threshold grounds" for disposing of a case without reaching the merits. *Id.* at 585. Accordingly, we may decide that abstention is proper under *Younger* without deciding whether plaintiffs have demonstrated Article III injury-in-fact. *See id.* (citing *Ellis v. Dyson,* 421 U.S. 426, 433-34 (1975)).

A. *Younger* Abstention

We review the District Court's *Younger* analysis *de novo, see Diamond "D" Constr.,* 282 F.3d at 197, and begin by analyzing the underlying principles and policies that dictate deference towards pending state proceedings. As

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[10] *But see Ctr. for Reproductive Law & Policy v. Bush,* 304 F.3d 183, 193-95 (2d Cir. 2002) (indicating that there may be certain exceptional cases where the court may dispose of the case on the merits to avoid deciding a novel and difficult question of standing).

the Supreme Court emphasized in *Younger v. Harris,* 401 U.S. 37, 43-45 (1971), federal courts should generally refrain from enjoining or otherwise interfering in ongoing state proceedings. This principle of abstention is grounded in interrelated principles of comity and federalism. *See Schlagler v. Phillips,* 166 F.3d 439, 442 (2d Cir. 1999). Both considerations require federal courts to be "cognizant that 'the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *Younger,* 401 U.S. at 44. "Our Federalism" in its ideal form, as the Supreme Court explained in *Younger,* strives towards "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* In recognition of this balance of interests, *Younger* generally prohibits courts from "taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings" so as to avoid unnecessary friction. *Diamond "D" Constr.,* 282 F.3d at 198. Giving states "the first opportunity . . . to correct their own mistakes" when there is an ongoing state proceeding serves the vital purpose of "reaffirm[ing] the competence of the state courts," and acknowledging the dignity of states as co-equal sovereigns in our federal system. *Id.* at 200.

Younger itself involved a First Amendment challenge to a pending state criminal proceeding. However, the same comity and federalism concerns are equally applicable to state administrative proceedings "in which important state interests are vindicated." *Ohio Civil Rights Comm'n*

v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986). Accordingly, *Younger* abstention is mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims.[11] *See Diamond "D" Constr.*, 282 F.3d at 198.

In this case, there is no dispute that the first two requirements for *Younger* abstention are satisfied. Plaintiffs filed suit after the Commission initiated a disciplinary proceeding against Spargo, a proceeding that undeniably implicates a vital state interest. Indeed, few interests can be considered more central than a state's interest in regulating its own judicial system. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring in the judgment) (emphasizing that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary"); *cf. Pincham v. Ill. Judicial Inquiry Bd.*, 872 F.2d 1341, 1347 (7th Cir.) (recognizing that the state has a vital interest in "preserving a fair and impartial judiciary"), *cert. denied*, 493 U.S. 975 (1989); *Anonymous v. Ass'n of the Bar of the City of New York*, 515 F.2d 427, 430 (2d Cir.) (noting that "[i]t would appear axiomatic that the effective

[11] "Despite the strong policy in favor of abstention," even where *Younger* would otherwise apply, a federal court may still intervene in state proceedings if the plaintiff demonstrates "bad faith, harassment or any other unusual circumstance that would call for equitable relief." *Diamond "D" Constr.*, 282 F.3d at 198 (quoting *Younger*, 401 U.S. at 54 and delineating scope of the "bad faith" and "extraordinary circumstances" exceptions to *Younger* abstention). However, plaintiffs do not allege that any of these exceptions apply here.

functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large"), *cert. denied,* 423 U.S. 863 (1975).

Plaintiffs primarily argue that abstention is inappropriate, because there is no opportunity for Spargo to meaningfully pursue his constitutional claims in the pending disciplinary proceeding, and because McNally and Kermani are not party to any pending Commission proceeding or other state action. In analyzing plaintiffs' arguments against abstention, we note that the underlying facts and claims in this case are strikingly similar to the facts and issues raised in *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423 (1982), the seminal Supreme Court case that first clearly extended *Younger* to state administrative proceedings. In *Middlesex,* plaintiffs brought a federal action, alleging that several attorney disciplinary rules promulgated by the New Jersey Supreme Court violated the First Amendment. Prior to the initiation of the federal action, one of the plaintiffs, Lennox Hinds ("Hinds"), a practicing New Jersey attorney, was formally charged with violating the disciplinary rules by a county ethics committee after he allegedly made statements disparaging the judicial system during the course of a criminal trial. *See id.* at 427-28. Instead of answering the charges, Hinds filed suit in federal court along with other plaintiff legal organizations, claiming that the New Jersey disciplinary rules violated the First Amendment and were facially overbroad and vague. *See id.* at 429. The district court dismissed the suit under *Younger,* but a divided panel of the Third Circuit reversed, concluding that abstention was improper because the state disciplinary proceedings did not provide

plaintiffs with a meaningful opportunity to adjudicate their constitutional claims. *See Garden State Bar Ass'n,* 643 F.2d at 121.

In rejecting the application of *Younger,* the Third Circuit focused on the fact that the state disciplinary proceedings were nonadjudicative in nature, and primarily "designed to elicit facts, not legal arguments," *id.* at 126, and concluded that even if Hinds could raise a constitutional challenge during his pending disciplinary proceedings, New Jersey:

> rules [made] no provision for the filing of an opinion by the District Ethics Committee or the Disciplinary Review Board [and hence] . . . [t]he very privacy of the proceeding militate[d] against a meaningful constitutional adjudication, since the determination [would] not provide any remedy against the chill which the rules and the filing of charges allegedly created in the minds of other members of the New Jersey bar.

Id. "On petition for rehearing petitioner attached an affidavit from the Clerk of the New Jersey Supreme Court which stated that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and that the court would [also] consider whether such a procedure should be made explicit in the Supreme Court rules." *Middlesex County Ethics Comm.,* 457 U.S. at 430. However, the Third Circuit panel declined to alter its original decision, reasoning that it was not established that Hinds could have obtained such judicial review when the federal complaint was filed, and that, in any event, such discretionary action by the New Jersey Supreme Court was not sufficient to trigger mandatory abstention. *See Garden*

State Bar Ass'n v. Middlesex County Ethics Comm., 651 F.2d 154, 156-57 (3d Cir. 1981).

The Supreme Court reversed, noting that the importance of the state interest in "maintaining and assuring the professional conduct of the attorneys it licenses . . . calls *Younger* abstention into play," and concluding that "[s]o long as the constitutional claims of [plaintiffs] can be determined in the state proceedings . . . the federal courts should abstain." *Middlesex County Ethics Comm.*, 457 U.S. at 434-35. The Supreme Court's decision further emphasized that in conducting the *Younger* inquiry, considerations of comity "preclude[ ] any *presumption* that the state courts will not safeguard federal constitutional rights." *See id.* at 431. Noting that abstention is based on the fundamental principle that parties should assert any available constitutional defenses in state proceedings unless it is plainly apparent that they are barred from raising such constitutional claims, the Supreme Court placed the burden of establishing the inadequacy of state proceedings squarely on the party seeking to avoid abstention. *See id.* at 435-36.

In addition, while the Supreme Court in *Middlesex* acknowledged that whether Hinds could seek judicial review of his constitutional claims during the course of state proceedings was initially unclear, the Court also recognized that the New Jersey Supreme Court had subsequently considered Hinds's claims *sua sponte* and formally amended its rules to permit interlocutory review of constitutional challenges to attorney disciplinary proceedings. *See id.* at 427, 436. Concluding that "[t]here [was] no reason for the federal courts to ignore . . . subsequent development[s]" demonstrating that Hinds had had an opportunity to raise his constitutional claims during

the course of state proceedings, the Supreme Court held that the mandatory abstention applied to Hinds's First Amendment claims. *See id.* at 436-37.

B. Adequate Opportunity to Raise Constitutional Claims in State Proceedings

Here, as in *Middlesex,* abstention largely turns on the question of whether Spargo has an adequate opportunity to raise his constitutional claims in the pending state proceeding. On appeal, despite the intervening decisions by the New York Court of Appeals, plaintiffs still contend that state law does not clearly grant the Commission jurisdiction to consider constitutional arguments or provide for mandatory review of the Commission's disciplinary decisions by the Court of Appeals. Plaintiffs also argue that abstention would still be unwarranted, even if the Commission were willing to consider Spargo's constitutional claims, because: (1) the misconduct charges against Spargo could be dismissed on alternate grounds, leaving the constitutionality of the challenged judicial conduct rules still in question, (2) the Commission may choose to summarily reject Spargo's constitutional claims, effectively limiting Spargo's ability to seek meaningful review before the Court of Appeals, and (3) the Commission's decision will remain confidential, and thus have limited precedential value even if Spargo prevails on his constitutional challenges.

None of these arguments have any merit given *Middlesex*'s unequivocal statement that abstention is appropriate where the plaintiff has an "opportunity to raise and have timely decided by a competent state tribunal" the constitutional claims at issue in the federal suit.

Middlesex County Ethics Comm., 457 U.S. at 437 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)); *see also Juidice v. Vail*, 430 U.S. 327, 337 (1977) (reasoning that where it is "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings . . . [n]o more is required to invoke *Younger* abstention"). More importantly, under *Younger*, any uncertainties as to the scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention. *See Butler v. Ala. Judicial Inquiry Comm'n*, 261 F.3d 1154, 1159 (11th Cir. 2001) (concluding that abstention was required even without authoritative guidance as to whether plaintiff could raise his First Amendment claims in the pending state judicial discipline proceeding).

Accordingly, to avoid abstention, plaintiffs must demonstrate that state law bars the effective consideration of their constitutional claims. *See Middlesex County Ethics Comm.*, 457 U.S. at 432 (where pending administrative proceedings implicate important state interests, "a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims'") (quoting *Moore v. Sims*, 442 U.S. 415, 426 (1979)); *Ohio Civil Rights Comm'n*, 477 U.S. at 629 (holding that abstention was mandatory where plaintiff could cite no state authority preventing judicial review of his constitutional claims); *Kirschner v. Klemons*, 225 F.3d 227, 235 (2d Cir. 2000) (to establish the inadequacy of state remedies, the plaintiff must "show[] that the State's laws, procedures, or practices would prevent his effective interposition of his federal contentions"). In this case, the District Court declined to abstain, noting that defendants had failed to cite any cases in which the Commission or the Court of

Appeals had ever addressed a constitutional challenge to the judicial conduct rules. *See Spargo,* 244 F. Supp. 2d at 85. However, under *Younger,* it is the plaintiff's burden to demonstrate that state remedies are inadequate, and defendants need not establish that state law definitively permits the interposition of constitutional claims.

In opposition to abstention, the plaintiffs have merely pointed to potential ambiguities in state statutes and regulations. But in applying *Younger,* federal courts may not "assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 15 (1987). Even if we accept that no other constitutional challenges to the New York judicial conduct rules have ever been addressed, "in the history of state proceedings" as the District Court found, *see Spargo,* 244 F. Supp. 2d at 85, plaintiffs have not pointed to any state law or firmly established state practice that would effectively bar Spargo from asserting constitutional defenses to the Commission's disciplinary charges.[12]

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[12] Moreover, while "*Younger* abstention often involves a level of uncertainty," a plaintiff, like Spargo, who decides to file a federal action before presenting his constitutional claims in state proceedings may himself preclude the federal court from knowing with any assurance "how the state court would have responded." *Butler,* 261 F.3d at 1159 n.6; *cf. Middlesex County Ethics Comm.,* 457 U.S. at 435 (concluding that *Younger* abstention was warranted where the plaintiff had not attempted to raise his constitutional challenges in his state disciplinary proceeding and could point to no regulatory or statutory authority that would have barred the ethics committee from considering his constitutional claims).

In addition, as in *Middlesex,* any doubts about the Commission's willingness to consider constitutional challenges or the availability of judicial review have been resolved pending appeal, and there is no reason for this Court to ignore the New York Court of Appeals' subsequent decisions in *In re Raab,* 763 N.Y.S.2d 213 (N.Y. 2003) (per curiam) and *In re Watson,* 763 N.Y.S.2d 219 (N.Y. 2003) (per curiam), both of which unambiguously affirm that the Commission will consider First Amendment arguments and, further, establish that sanctioned judges may seek mandatory review of the Commission's decision before the Court of Appeals.[13] Such ability to raise constitutional claims in subsequent "state-court judicial review of [an underlying] administrative proceeding" is sufficient to provide plaintiffs with a meaningful opportunity to seek effective relief through state proceedings and bar federal courts from taking jurisdiction over the same claims while the state proceeding is pending.[14] *See Ohio Civil Rights*

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[13] We acknowledge that the District Court did not have the benefit of these Court of Appeals decisions when faced with the threshold abstention question, and in this case, unlike in *Middlesex,* "proceedings of substance on the merits" had taken place in federal court prior to the subsequent clarification of the scope of state proceedings. *Middlesex County Ethics Comm.,* 457 U.S. at 436 (quoting *Hicks v. Miranda,* 422 U.S. 332, 349 (1975)). Even under these circumstances, we believe that abstention is still appropriate. Perhaps the balance of equities would be different in another situation where state law changes substantially during the pendency of the federal case. But here, where there was merely initial ambiguity as to the scope of available judicial review, a possibility that does not prevent the application of *Younger,* abstention is not precluded solely because the District Court ruled on the merits of plaintiffs' constitutional claims.

[14] Indeed, some courts would hold that abstention is required even where only discretionary judicial review is available. In *Hirsch v. Justices of the Supreme Court of California,* 67 F.3d 708, 712-13 (9th

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Comm'n, 477 U.S. at 629; *Cullen v. Fliegner,* 18 F.3d 96, 103 (2d Cir. 1994).

Significantly, this conclusion is not altered by the fact that Spargo's disciplinary charges may be dismissed on other grounds, such as for lack of substantial evidence, or by the fact that the Court of Appeals may choose to narrowly construe the judicial conduct rules to avoid a potential constitutional confrontation, as the plaintiffs suggest. The relevant question under *Younger* is "whether the state's procedural remedies *could* provide the relief sought [not] . . . whether the state *will* provide" the constitutional ruling which the plaintiff seeks. *Kirschner,* 225 F.3d at 234-35 (emphasis added) (noting that "it [was] irrelevant to the application of *Younger* that [plaintiff's] constitutional claims . . . [had] not [been] addressed by the Appellate Division" where the Appellate Division found for plaintiff on alternate grounds). Indeed, insisting on the priority of federal constitutional claims would undermine the considerations of comity and deference that underlie *Younger.* As the Supreme Court has explained, an "important reason for [*Younger*] abstention is

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Cir. 1995) (per curiam), for example, the Ninth Circuit affirmed the dismissal of plaintiffs' constitutional challenges to the California attorney discipline system although constitutional claims could not be considered during the initial disciplinary proceeding and the California Supreme Court's review of the disciplinary decision was wholly discretionary. The Ninth Circuit reasoned that "[j]udicial review is inadequate" under *Younger* "only when state procedural law bars presentation of the federal claims" and "[t]he fact that review is discretionary does not bar presentation of [plaintiff's] federal claims." *Id.* at 713; *see also Fieger v. Thomas,* 74 F.3d 740, 748-49 (6th Cir. 1996) (rejecting argument that *Younger* can only apply where the plaintiff has an appeal as of right from an adverse administrative decision).

to avoid unwarranted determination of federal constitutional questions" where it is possible that state courts may resolve the case on state law grounds "without reaching the federal constitutional questions." *Pennzoil,* 481 U.S. at 11-12. "*Younger* abstention in situations like this 'offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.'" *Id.* at 12 (quoting *Moore v. Sims,* 442 U.S. at 429-30); *see also Yamaha Motor Corp., U.S.A., v. Stroud,* 179 F.3d 598, 603 (8th Cir. 1999) (noting that "[c]omity favors permitting the [state] court system to decide issues of state statutory law, and abstention is called for when it is possible that the state court might interpret the underlying law in such a way as to foreclose the need to review at least some of the plaintiff's federal claims," and indicating that "[t]his rationale applies with even more force when abstention might allow the federal court to avoid unnecessary constitutional questions").[15] Thus, the argument that Spargo's disciplinary proceeding could be resolved on alternative grounds, without deciding the constitutional issues raised in the federal suit, actually weighs in favor of, and not against, the exercise of abstention.[16]

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[15] The same considerations that weigh in favor of abstention also counsel in favor of certification to state courts to avoid "premature adjudication of constitutional questions . . . when a federal court is asked to invalidate a State's law." *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 79 (1997).

[16] Plaintiffs also suggest that the Commission could keep constitutional challenges from reaching the Court of Appeals by strategically dismissing misconduct charges. However, these allegations are merely speculative, and there is no reason to believe that the Commission would so act, in direct contravention of its statutory duty.

Plaintiffs also challenge the adequacy of state proceedings, because the Commission's findings are kept confidential unless a sanctioned judge requests further review by the Court of Appeals, *see* N.Y. Jud. Law §§ 44(7) & 45, and the Commission has no obligation to issue a full decision should it reach the merits of Spargo's constitutional challenge. In assessing these arguments, we begin by noting that the record gives us no reason to question the ability of either the Commission or the Court of Appeals to fully and fairly address Spargo's constitutional claims despite plaintiffs' intimations to the contrary. In addition, while plaintiffs point to procedural differences between the state administrative process and federal litigation, *Younger* implicitly recognizes that states may adopt a variety of different procedures to resolve legal disputes, yet it directs federal courts to defer to state procedures, leaving state institutions "free to perform their separate functions in their separate ways." *Younger,* 401 U.S. at 44. Moreover, similar arguments about the adequacy of state proceedings were rejected by the Supreme Court in *Middlesex,* a case which also involved a disciplinary hearing before a state ethics committee whose primary mission was fact-finding. *See Middlesex County Ethics Comm.,* 457 U.S. at 429. The Supreme Court determined that the availability of further judicial review before the state's highest court triggered mandatory abstention under *Younger* although the ethics committee was not required to issue a formal written opinion of its disciplinary decision and proceedings before the committee were confidential. *See id.* at 436-37.

We emphasize that *Younger* merely "presupposes that the plaintiff be able to interpose his federal defense . . . in the state court; it does not [additionally] require all

procedures for the interposition of the federal defense to be as advantageous in the state court as in the federal action." *Kirschner,* 225 F.3d at 235; *see also Brooks v. New Hampshire Supreme Court,* 80 F.3d 633, 639 (1st Cir. 1996) (rejecting plaintiff's argument that a state attorney discipline proceeding "is less than adequate because of its confidential character," and noting that "the Supreme Court has never suggested that having an adequate opportunity to present a federal claim requires [that] the parallel state proceeding be open to the public."). In sum, while Spargo may prefer a federal forum, he may pursue his constitutional claims in state proceedings, and therefore, the District Court should have abstained. *See 31 Foster Children v. Bush,* 329 F.3d 1255, 1279 (11th Cir.) (concluding that "[i]n determining whether the state remedies are adequate . . . the relevant question is not whether the state courts can do all that Plaintiffs wish" but rather whether plaintiffs may pursue their federal claims in state proceedings) (internal quotation marks omitted), *cert. denied sub nom. Reggie B. v. Bush,* 124 S.Ct. 483 (2003).

In so holding, we do not ignore the importance of the First Amendment interests at stake or disregard the costs of delay in postponing a decision on the merits. However, *Younger* itself warns that "the existence of a 'chilling effect,' even in the area of First Amendment rights," is not "a sufficient basis, in and of itself, for prohibiting state action." *Younger,* 401 U.S. at 51. Accordingly, while we recognize that abstention may impose significant costs, the "costs of duplication and delay caused by *Younger,*" *For Your Eyes Only, Inc. v. City of Columbus,* 281 F.3d 1209, 1219-20 (11th Cir. 2002), must be balanced against the risk of undue interference and unnecessary conflict with

state proceedings. *Cf. Younger,* 401 U.S. at 44 (rejecting notion that federalism contemplates the "centralization of control over every important issue" in the federal courts). Consequently, while the significance of the First Amendment interests at stake may play a role in *Younger* analysis, in this case, where the requirements for abstention are clearly satisfied, and Spargo can seek timely review before the New York Court of Appeals, the First Amendment concerns raised by the plaintiffs do not justify any exception to ordinary *Younger* principles.[17]

C. Abstention Over the Related Claims of Third-Parties

In support of the District Court's decision, plaintiffs also argue that *Younger* does not permissibly extend to the claims of McNally and Kermani as neither was a party to the ongoing disciplinary proceeding against Spargo – a question that the Supreme Court left unresolved in *Middlesex. See Middlesex County Ethics Comm.,* 457 U.S. at 437 n.17 (noting that "[i]t is not clear whether the Court of Appeals decided whether abstention would be proper as to the [plaintiff] organizations who are not parties to the

[17] We note that plaintiffs are not entitled to any presumption against abstention simply because they have challenged multiple provisions of the judicial conduct rules and seek sweeping injunctive relief. Generally, "[t]he breadth of a challenge to a complex state statutory scheme . . . militate[s] in *favor* of abstention, not *against* it . . . [due] to the primacy of the State in the interpretation of its own laws and the cost to our federal system . . . inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework." *Moore v. Sims,* 442 U.S. 415, 427 (1979) (emphasis in original); *see also Fieger v. Thomas,* 74 F.3d 740, 745 (6th Cir. 1996) (same).

state disciplinary proceedings," and "leav[ing] this issue to the Court of Appeals on remand"). As we explain more fully below, we reject plaintiffs' attempt to apply *Younger* in a mechanical fashion and find under the circumstances of this case that the legal interests of McNally and Kermani are sufficiently intertwined with those of Spargo to make abstention applicable to all of the plaintiffs' claims. *See generally Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) (warning that while plaintiffs should not "automatically be thrown into the same hopper for *Younger* purposes," there may plainly "be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them").

As the Supreme Court has recognized, in certain circumstances, *Younger* may apply to the claims of third-parties who are not directly involved in any pending state proceeding. For example, in *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975), the Supreme Court held that *Younger* barred the claims of two theater owners who sought to enjoin enforcement of a state obscenity statute. Although no state proceedings were pending against the theater owners at the time the federal complaint was filed, criminal charges had been filed against two employees of the theater, and authorities had seized four copies of the allegedly obscene film. The Court concluded that *Younger* could not be avoided under these circumstances, because the interests of the theater owners and the employees "were intertwined[,] and . . . the federal action sought to interfere with the pending state prosecution." *Id.*

This principle was reaffirmed in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975), where the Supreme Court reiterated that there may be some circumstances where

plaintiffs "are so closely related" that abstention will be warranted although not all plaintiffs are subject to the pending state proceeding. *Doran* involved a suit by three bar owners who sought to enjoin enforcement of a local ordinance prohibiting topless dancing. *See id.* at 924. Although all three bar owners had similar business interests and were represented by the same counsel, only one of the owners had been criminally prosecuted in state court. *See id.* at 928-30. Because, the plaintiffs were otherwise "unrelated in terms of ownership, control, and management," the Court declined to apply *Younger* to the two bar owners who had not been subject to state prosecution. *See id.* at 928-29.

While both *Hicks* and *Doran* arguably focus on the fact of joint ownership and control, neither decision limits the application of *Younger* to cases where the parties are financially related or linked by mutual management. Courts have consistently recognized that while "[c]ongruence of interests is not enough," by itself, to warrant abstention, where the plaintiffs' interests are so inextricably intertwined that "direct interference with the state court proceeding is inevitable," *Younger* may extend to bar the claims of plaintiffs who are not party to the pending state proceeding. *See, e.g., Green v. City of Tucson,* 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc); *see also Cedar Rapids Cellular Tel., L.P., v. Miller,* 280 F.3d 874, 881-82 (8th Cir. 2002) (noting that for *Younger* purposes, "the parties in federal and state court need not be identical where the interests of the parties seeking relief in federal court are closely related to those of [the] parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings") (internal quotation marks omitted).

In applying *Younger* to third-parties, courts should be sensitive to the fact that, "abstention from the exercise of federal jurisdiction is the narrow exception, not the rule," *Cecos Int'l, Inc. v. Jorling,* 895 F.2d 66, 70 (2d Cir. 1990), and that there is "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail,* 434 U.S. 374, 380 n.5 (1978); *see also Green,* 255 F.3d at 1099 (warning that *Younger* abstention "is not intended to cut a broad swath through the fabric of federal jurisdiction, relegating parties to state court whenever state court litigation could resolve a federal question"); *cf. Robinson v. Stovall,* 646 F.2d 1087, 1090 (5th Cir. Unit A 1981) (noting that "[e]xcept in extraordinary circumstances, a civil rights plaintiff's ability to sue to vindicate his rights in federal court is not affected by the simultaneous pendency of a state prosecution against someone else" unless the federal plaintiff seeks to directly enjoin the pending state prosecution).

Although plaintiffs may seek the same relief, parallel challenges to the constitutionality of a state statute or policy are typically not barred by *Younger* absent other factors indicating that the plaintiffs' interests are legally interwoven or interconnected. *See generally Steffel v. Thompson,* 415 U.S. 452 (1974) (plaintiff was not barred from seeking federal declaratory relief, where only his companion had been arrested for distributing handbills, and no state criminal proceeding was pending against plaintiff at the time the federal complaint was filed); *Casa Marie,* 988 F.2d at 267-68 (noting that "unrelated, legally

distinct parties" may "mount separate but simultaneous legal challenges to the constitutionality of a state statute").[18] In this case, however, McNally and Kermani do not assert independent First Amendment rights, nor do they bring truly separate challenges to the judicial conduct rules.

Because the judicial conduct rules apply only to judges and judicial candidates, McNally and Kermani are not directly regulated by the challenged rules. Instead, McNally and Kermani claim standing to bring suit based on their interest in receiving political speech from judges and judicial candidates and in associating politically with elected judges without the restrictions imposed by the conduct rules. While it is well-established that the First Amendment protects not only the right to engage in protected speech, but also the right to receive such speech, *see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748, 756 (1976) (noting that where a willing speaker exists, First Amendment protection extends to both the source as well as the recipient of the protected communication), – it remains true that the rights of the recipients of speech (such as McNally and Kermani) derive in the first instance from the primary rights of the speaker. *See In re App. of Dow Jones & Co.,* 842 F.2d 603, 608 (2d Cir.), *cert. denied sub nom. Dow Jones & Co. v. Simon,* 488 U.S. 946 (1988); *N.A.A.C.P., Los*

[18] As the Supreme Court explained in *Doran,* the existence of such parallel suits is simply a necessary cost of our federal system which vests concurrent jurisdiction over constitutional issues in both federal and state courts. *See Doran,* 422 U.S. at 928.

Angeles Branch v. Jones, 131 F.3d 1317, 1322 & n.5 (9th Cir. 1997), *cert. denied*, 525 U.S. 813 (1998).

As a result, McNally and Kermani may claim no greater First Amendment protection than Spargo, and their "[s]uccess on the merits . . . is entirely derivative" of whatever rights that Spargo may have to engage in the prohibited speech and political activity.[19] *See In re App. of*

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[19] McNally and Kermani also allege in conclusory fashion that they have refrained from associating with and supporting other judges and judicial candidates because of the disciplinary charges against Spargo. However, McNally and Kermani have not specifically identified any other judges or judicial candidates who wish to engage in allegedly prohibited speech or political activity, nor does the record demonstrate that there is a likelihood of future disciplinary action against any judge or judicial candidate whom McNally and Kermani wish to support politically.

Under these circumstances, there is substantial doubt as to whether plaintiffs have standing to seek equitable relief based on the speech of other judges, and even if plaintiffs could demonstrate such standing, whether the controversy is sufficiently ripe for adjudication. *See, e.g., Competitive Enter. Inst. v. U.S. Dept. of Transp.*, 856 F.2d 1563, 1566 (D.C. Cir. 1988) (noting that "[w]hether the injury is phrased as a deprivation of information that the listener would find useful or the interference with a relationship between speaker and listener, a government regulation cannot cause that injury unless [plaintiffs] can identify a willing speaker"); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1211 (5th Cir. 1982) ("Recipients of protected communications have standing only if there is a speaker who wishes to express himself or herself."); *cf. Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225-27, 228 (2d Cir.) (dismissing preenforcement First Amendment facial challenge to federal dietary supplement labeling regulations as unripe), *cert. denied*, 525 U.S. 1040 (1998).

In any event, plaintiffs' allegations about other judges and judicial candidates are too speculative to avoid the application of *Younger*. Throughout this litigation, plaintiffs have relied almost exclusively on their close relationship with Spargo to establish an interest in the challenged judicial conduct rules, and therefore, cannot now seek to

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Dow Jones & Co., 842 F.2d at 608 (explaining that plaintiff news agencies' "right to receive speech does not enlarge the rights of those directly subject to the [challenged] restraining order"); *Jones,* 131 F.3d at 1322-23 (concluding that "voter plaintiffs, as recipients of campaign speech, have no greater rights than the candidates to have candidates publish statements," and "plaintiffs' status as voters in an election does not extend their First Amendment rights to include a more general right to receive publicly funded campaign speech"). Because McNally and Kermani could have a protected interest in hearing Spargo speak and in associating politically with Spargo only if Spargo has an underlying First Amendment right to engage in such speech and political activity, the legal analysis of the plaintiffs' claims are unavoidably intertwined and inseparable. McNally's and Kermani's claims are largely the mirror-image of Spargo's First Amendment challenge, and it would be impossible for the District Court to analyze plaintiffs' claims independently without first analyzing Spargo's constitutional right to engage in the charged conduct, a matter which, under *Younger,* must be resolved in the pending state disciplinary proceeding.

Because plaintiffs' claims are essentially derivative, this case presents one of the narrow circumstances in which *Younger* may properly extend to bar claims of third-parties who are not directly involved in the pending state

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downplay the connection to prevail on *Younger* grounds. *Cf. Collins v. County of Kendall,* 807 F.2d 95, 102 (7th Cir. 1986) (concluding that court would not ignore the parties' close relationship in determining the scope of *Younger* abstention where the plaintiff had previously urged the court to view the facts as a whole and treat the plaintiffs as tightly connected), *cert. denied,* 483 U.S. 1005 (1987).

action.[20] *Cf. Allee v. Medrano,* 416 U.S. 802, 830-31 (1974) (Burger, J., concurring in the judgment in part and dissenting in part) (reasoning that *Younger* abstention should also apply to a union's First Amendment claims, where the union is seeking to assert the interests of members prosecuted in state court); *but see N.J.-Philadelphia Presbytery of the Bible Presbyterian Church v. N.J. State Bd. of Higher Educ.,* 654 F.2d 868, 877-88 (3d Cir. 1981) (in a First Amendment challenge to a state licensing regime, abstention did not extend to plaintiffs who were not party to the state proceeding, because the parents, students, and teachers involved in the suit asserted First Amendment rights distinct from those of the religious college involved in the ongoing state litigation).

Moreover, the second prerequisite for extending *Younger* is present, as plaintiffs seek to directly interfere with the pending disciplinary proceeding against Spargo by requesting that the District Court permanently enjoin defendants from pursuing the disciplinary proceeding or otherwise enforcing the challenged judicial conduct rules. In addition, there is no suggestion that Spargo would fail to adequately represent plaintiffs' interests in the state disciplinary proceeding, and it appears that McNally and Kermani could seek to appear as *amici curiae, see* 22 N.Y.C.R.R. § 500.11(e), should the case eventually reach

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[20] Although not dispositive, we note that the case for abstention is particularly strong as to McNally, as Spargo is specifically charged with authorizing an improper payment to McNally in violation of 22 N.Y.C.R.R. §§ 100.1, 100.2, and 100.5(A)(4)(a). In addition, while McNally is technically not a party to the pending disciplinary proceeding, she was subpoenaed to testify before the Commission during the course of its investigation into Spargo's campaign activities.

the Court of Appeals, *see In re Raab,* 763 N.Y.S.2d 213 (N.Y. 2003) (per curiam) (permitting the filing of *amici curiae* briefs in analyzing First Amendment challenge to judicial conduct rules); *In re Watson,* 763 N.Y.S.2d 219 (N.Y. 2003) (per curiam) (same), or attempt to bring a separate declaratory judgment action challenging the constitutionality of the rules. *See* N.Y. C.P.L.R. § 3001 (authorizing the state supreme court to "render a declaratory judgment having the effect of a final judgment as to the rights and legal relations of the parties to a justiciable controversy"); *Schultz v. City of Port Jervis,* 662 N.Y.S.2d 591, 592 (2d Dep't 1997) (mem.) (noting that "a declaratory judgment action is the appropriate procedural vehicle to challenge the constitutionality of a [state] statute or ordinance").[21]

Conclusion

In sum, for the reasons stated above, we conclude that Spargo has an adequate opportunity to raise his constitutional claims in the pending disciplinary proceeding and accordingly hold that the District Court should have abstained from exercising jurisdiction over Spargo's claims in deference to the state proceeding. In addition, we find that the First Amendment interests of plaintiffs McNally

[21] Although some courts have suggested that *Younger* can only be applied to third-party plaintiffs whose interests are closely aligned with a state court litigant if the third-party plaintiffs can intervene in the state proceeding to protect their interests, *see, e.g., Robinson,* 646 F.2d at 1092, *Casa Marie,* 988 F.2d at 267, *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church,* 654 F.2d at 882, we believe in the particular circumstances before us, that *Younger* need not be read so restrictively.

and Kermani are derivative of Spargo's right to engage in protected speech. Because plaintiffs' legal claims are inextricably intertwined, and the federal suit seeks to directly interfere with the pending state disciplinary proceeding, we conclude that *Younger* extends to bar the claims of McNally and Kermani although neither is a party to the state disciplinary proceeding. We therefore vacate the judgment of the District Court and remand with instruction to the District Court to abstain from exercising jurisdiction over the plaintiffs' action.[22]

[22] In so doing, we again caution that we express no view on the merits of the plaintiffs' claims or the substance of the District Court's First Amendment analysis.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS J. SPARGO, JANE McNALLY, and PETER KERMANI,

Plaintiffs,

-v- 1:02-CV-1320

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, individually and as Administrator of the State Commission on Judicial Conduct, and HENRY T. BERGER, individually and as Chairperson of the New York State Commission on Judicial Conduct,

Defendants.

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DAVID N. HURD
United States District Judge

DECISION and ORDER

(Filed Apr. 29, 2003)

I. INTRODUCTION

On March 7, 2003, defendants filed a Notice of Appeal regarding the Memorandum-Decision and Order filed on February 20, 2003, permanently enjoining defendants from enforcing certain sections of the New York State Code of Judicial Conduct ("Code"). Defendants now move for a stay of that permanent injunction pending a resolution of the appeal. Plaintiffs oppose. The motion was taken on submission of the papers without oral argument. Familiarity with the February 20, 2003, Memorandum-Decision and Order is assumed. *See Spargo v. New York State Comm'n on Judicial Conduct,* 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

II. DISCUSSION

A. Standard

Four factors must be considered in determining whether to issue a stay pending appeal. *Mohammed v. Reno,* 309 F.3d 95, 100 (2d Cir. 2002). The factors are "the

likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest." *Id.* (citing *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S. Ct. 2113 (1987)). The required degree of likelihood of success on the merits varies according to the assessment of the other three factors. *Id.* at 101. In other words, where there is lower quantum of irreparable injury to the movant if a stay is denied, then a higher showing of likelihood on the merits is required. *See id.* The inverse is also true. *See id.* Additionally, "mere repetition of arguments previously considered and rejected cannot be characterized as a 'strong showing'" of success on the merits. *Schwartz v. Dolan,* 159 F.R.D. 380, 383 (N.D.N.Y. 1995), *vacated in part,* 86 F.3d 315, 318 (2d Cir. 1996) (noting that it also denied a stay pending appeal). Because the degree of the likelihood of success on the merits varies depending upon the other factors, it will be considered last.

B. Analysis

1. Irreparable Injury to Defendants

Defendants argue that absent a stay pending appeal, the Commission is impeded from carrying out its mandate under the New York Constitution, and there is confusion and delay in its proceedings. However, as was previously made clear, the Commission is free to pursue misconduct proceedings pursuant to any Code provisions that were not challenged. *See* 244 F. Supp. 2d at 92. Further, should the decision be reversed on appeal, the Commission could then proceed with any charges. The only possible injury is delay in Commission proceedings. Any delay would not constitute irreparable injury, because proceedings would recommence upon resolution of the appeal. Concern regarding delay

pending appeal would better be resolved by requesting an expedited appeal rather than a stay. In sum, a delay in pursuing charges based upon the provisions found to be unconstitutional will result in no irreparable injury to defendants.

Defendants further contend that irreparable injury results because no other Code provisions prohibit unlawful conduct. Again, the only harm from not proceeding with misconduct charges based upon unlawful activity would be delay, lasting only as long as the appeal is pending. In addition, as defendants point out, misconduct based upon unlawful conduct could be pursued while the appeal is pending based upon the state constitutional provision permitting removal of judges "for cause." Further, unlawful conduct should be addressed by a criminal prosecution.

There is no irreparable injury to defendants if the stay is denied.

2. Substantial Injury to Plaintiffs

Permitting the Commission to proceed with misconduct charges based upon unconstitutional provisions of the Code would result in substantial injury to plaintiff Spargo. Defendants assert that any such harm can be avoided by continuing the injunction solely as to Spargo. Then the Commission could proceed with misconduct charges against other judges based upon the unconstitutional provisions of the Code. In effect, defendants argument is that harm to Spargo could be prevented, while permitting substantial injury to all those judges against whom charges are brought based upon unconstitutional Code provisions. In other words, remove the risk of harm as to

Spargo – at the same time subjecting countless others to the same harm. This argument is rejected out of hand.

3. The Public Interest

Defendants argue that the public interest weighs in favor of granting the stay. They argue that delays will occur absent a stay, and that lengthy delays would create havoc in the Commission's carrying out of its (state) constitutional mandate.

Defendants first assert that the significance of the public interest is demonstrated by the derivation of the Code from the American Bar Association provisions and the similarity to the code of conduct applicable to federal judges.[1] That similar provisions may apply to judges outside of the New York State judiciary does demonstrate that there is a significant public interest at stake. However, the public interest will not be served by permitting pursuit of misconduct charges, in New York, based upon unconstitutional Code provisions. Rather, the public interest of New Yorkers will be served by prohibiting the Commission from bringing misconduct proceedings that impinge upon constitutional rights, demonstrating that constitutional rights are of the highest import in New York. Similarly, the public interest of other jurisdictions would not be served by permitting constitutional violations but would be served by preventing such violations. Thus, defendants' argument about the significance of the public

[1] Defendants' concern is that other jurisdictions may follow the finding that similarly worded provisions are unconstitutional, thus impacting similar judicial conduct commissions beyond New York.

interest is not helpful to their contention that it is in the public interest to grant a stay.

Defendants also argue that absent a stay, political parties might pressure judges to become involved in partisan political activity. The argument goes that if judges succumb to this pressure, then the dignity appropriate to judicial office will be denigrated. This argument, if valid, might help demonstrate that maintaining the dignity of the judicial office outweighs the constitutional rights of some of its citizens (judges and judicial candidates), but not that permitting the continuing impingement of constitutional rights is in the public interest. Moreover, the appropriate solution would be rules that are narrowly tailored to serve the interest in maintaining the integrity of the judiciary (in other words, rules that do not unduly impinge upon First Amendment rights).

While confusion and delay in misconduct proceedings may be a temporary result of the injunction, it cannot be said that it is in the public interest to allow the Commission to violate judges' constitutional rights, including core First Amendment rights. Rather, the public interest lies in denying the stay, thereby preventing continued constitutional violations.

4. Likelihood of Success on the Merits

Given the lack of irreparable injury to defendant if the stay is denied, the substantial harm to plaintiffs if the stay is granted, and the public interest in denying the stay, there must be an extremely high likelihood of success on the merits to justify granting the stay. *See Mohammed,* 309 F.3d at 101. Defendants' arguments regarding success on the merits are simply attempts to re-argue issues

previously decided – with the introduction of contentions not previously made or made but not adequately supported. Such reargument cannot support a finding of a strong likelihood of success on the merits. *See Schwartz,* 159 F.R.D. at 383. However, a few matters merit mention.

On the abstention issue, defendants argue that *Nicholson v. State Comm'n on Judicial Conduct,* 50 N.Y.2d 597 (1980) (per curiam) illustrates that a request for review is not the only way to assert constitutional challenges; Article 78 is available.[2] The defendants never argued that Article 78 was a viable avenue for constitutional challenges to Code provisions. Therefore, the availability of Article 78 cannot now be sustained as a basis for finding that a state forum was available, making abstention appropriate. Further, it is again noted that *Nicholson* is inapposite because the Article 78 proceeding was not in the context of a misconduct proceeding against the plaintiff.

In additional support for their argument that there is a likelihood of success on the abstention issue, defendants cite *In re Sims,* 61 N.Y.2d 349 (N.Y. Ct. App. 1984). This case was not previously cited, despite a direct request by the Court for case law in which the Court of Appeals

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[2] First, it is not at all clear that Article 78 is available to Spargo, as administrative proceedings are ongoing. *See* N.Y. C.P.L.R. § 7801 (McKinney 1994). It is even more unclear how this provision would be available to McNally and Kermani, as defendants have merely stated Article 78's availability to them, without giving any clue as to how such an action would be framed or citing any analogous cases from which a clue could be derived. *See id.* § 7801 & Practice Commentaries (explaining the situations in which Article 78 actions may be brought).

reached a constitutional question on a review of a Commission determination.

Moreover, defendants mischaracterize the decision. Defendants state that the Court of Appeals "discussed the [constitutional] issues and referred to both statutory law and prior decisions . . . [then] specifically rejected Judge Sims [sic] contention that the phrase 'appearance of impropriety' was unconstitutionally vague." (Defs.' Mem. at 7.) To the contrary, the court did not discuss the constitutional issues, and the statutory and case law referenced did not even mention the constitutionality of Code provisions. In answer to Sims' contention that her due process rights were violated, the court merely found that "the investigation was thus based on adequate factual and legal requirements as required by the Judiciary Law and the commission's rules." *In re Sims,* 61 N.Y.2d at 358 (internal citations omitted). The court went on to state Sims' contention that the phrase "appearance of impropriety" was unconstitutionally vague, and noted that the appearance of impropriety rules "have [been] repeatedly upheld." *Id.*

The complete analysis of the vagueness question was as follows:

> Finally, petitioner contends that the ethical mandate that Judges avoid even an appearance of impropriety is unconstitutionally vague and will result in her punishment for acts which she could not know were proscribed. We have repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties (see Matter of Aldrich v. State Comm. on

> Judicial Conduct, 58 N.Y.2d 279, 283; Matter of Cunningham, 57 N.Y.2d 270, 274-275, supra.; see, also, Matter of Shilling, 51 N.Y.2d 397, supra.; Matter of Lonschein, 50 N.Y.2d 569, 572; Matter of Spector v. State Comm. on Judicial Conduct, 47 N.Y.2d 462, 469, supra).

Id. Clearly this is not a specific rejection of Sims' contention that the phrase is unconstitutionally vague – it is not a constitutional analysis at all. This is particularly evident upon perusal of the case law cited as authority that the appearance of impropriety rules had been repeatedly upheld. No constitutional question is raised in any of the cases cited. *See Aldrich v. State Comm'n on Judicial Conduct,* 58 N.Y.2d 279, 280-286 (N.Y. Ct. App. 1983); *In re Cunningham,* 57 N.Y.2d 270, 272-278 (N.Y. Ct. App. 1982); *In re Shilling,* 51 N.Y.2d 397, 399-411 (N.Y. Ct. App. 1980); *In re Lonschein,* 50 N.Y.2d 569, 571-575 (N.Y. Ct. App. 1980); *Spector v. State Comm'n on Judicial Conduct,* 47 N.Y.2d 462, 464-70 (N.Y. Ct. App. 1979). These were merely cases on review of misconduct determinations grounded in the appearance of impropriety provision. *See Aldrich,* 58 N.Y.2d at 282; *In re Cunningham,* 57 N.Y.2d at 274-75; *In re Shilling,* 51 N.Y.2d at 401-02; *In re Lonschein,* 50 N.Y.2d at 572; *Spector,* 47 N.Y.2d at 468-69. Thus, the inference – that this provision had repeatedly passed constitutional muster – drawn from the iteration of Sims' constitutional challenge followed by the "repeatedly upheld" language is invalid. What was actually "repeatedly upheld" were misconduct charges brought for violations of this provision. Therefore, the defendants have again failed to provide a single case in which the Court of Appeals accepted and analyzed constitutional claims such as those raised by the plaintiffs.

Some particularly apt comments were made in dissent in *Spector.* The dissenter noted concern "with what can be a very subjective and often faulty public perception," stating "The 'appearance of impropriety' concept is beset by legal and moral complexity." 47 N.Y.2d at 472 (Fuchsberg, J., dissenting). It was further noted that the "lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications." *Id.* at 473. (This is the only hint of a constitutional concern in all of the authority cited by the *Sims* Court for the proposition that the provision had been repeatedly upheld.) United States Supreme Court Justice Arthur Goldberg was quoted characterizing the appearance of impropriety standard as "unbelievably ambiguous." *Id.*

Defendants raise a new argument in support of their contention, previously made, that Court of Appeals review of misconduct determinations is mandatory.[3] They argue that the Court of Appeals rules, as well as the jurisdictional statement in cited case law, imply that a request initiates the review, rather than requiring a grant or denial of the review. First, a statement such as "[s]he initiated this proceeding to review a determination . . ." cannot be taken as a determination that review is mandatory. *See In re Sims,* 61 N.Y.2d at 351. Rather, the wording indicates that it is merely a statement of background,

[3] They also cite the Court of Appeals' acceptance of more than 79 requests for review, and no denials of requests, in the last 24 years as indicative of the mandatory nature of review. Again, this is new information not previously provided. Moreover, even if all requests for review have been granted to date, that does not mean that review is mandatory.

introducing the case. *See id.; In re Greenfeld,* 71 N.Y.2d 389, 390 (N.Y. Ct. App. 1988) (stating that "Petitioner instituted this proceeding to review . . ."). Further, language in some cases could be read the opposite; that is, that the request must be resolved initially. *See In re Greenfield,* 70 N.Y.2d 778, 778 (N.Y. Ct. App. 1987) (suspending petitioner "pending disposition of his request . . ."). Finally, even if review were mandatory, a constitutional question would still not be before the Court of Appeals for review, when it has been ignored by the Commission as beyond its authority. *See In re Shaw,* 96 N.Y.2d 7, 12 (N.Y. Ct. App. 2001) (per curiam) (noting that review is limited to the record at the time of the Commission's determination). Apparently, all previous constitutional challenges have been ignored by the Commission.

Defendants argue that no distinction was made between the investigation and the hearing to support the contention that a full record would be before the Court of Appeals on review, rather than a "scant" record. As previously noted, *see Spargo,* 244 F. Supp. 2d at 84, the support for that conclusion was that during the course of the investigation of Spargo, his challenge to the constitutionality of the Code provisions at issue was completely ignored by the Commission. When the Commission ignores such a challenge, the record would necessarily be devoid of a constitutional analysis. Again, the defendants have failed to cite even one case where the Commission has analyzed

and addressed a constitutional challenge to specific provisions of the Code.[4]

Defendants raise the new argument that it is proper for the Court of Appeals to decide a case before it on other grounds even when a constitutional challenge is raised. While this may be true, defendants have not cited a single case in which the Court of Appeals declined to decide a constitutional issue because of a determination on other grounds. Thus, this argument is not helpful in establishing a likelihood of success on the merits regarding the abstention issue.

Regarding the merits of the First Amendment issue, defendants attempt, for the first time, to distinguish the

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[4] Defendants set forth new information, not previously provided, calling into question the assertions in the Pisani affidavit regarding the Commission investigation of Elizabeth Shanley. Pisani asserted that Shanley raised a constitutional challenge early in the investigation, while defendants contend that Shanley failed to raise such a challenge before the Commission or in her main brief before the Court of Appeals, thus leaving the issue unpreserved for appeal. The circumstances still illustrate how a constitutional challenge at an early stage in misconduct proceedings can easily be outside the authority of the Commission and the scope of review by the Court of Appeals.

For example, a judge may raise a free speech constitutional challenge before the referee. When the referee recommends no sanction, the judge has no incentive to raise the challenge before the Commission. Even if the referee does recommend a sanction, a constitutional challenge would not be raised before the Commission, for history tells judges that to pursue such a challenge is fruitless because it will not even be considered, let alone addressed, by the Commission. The Commission has always limited itself to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of [state court judges]," N.Y. Const. art. 6 § 22(a) (McKinney Supp.2003), and not to render constitutional opinions.

speech at issue in *Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S. Ct. 2528 (2002) from the speech at issue here. In *White,* the speech at issue was judicial candidates announcing views on issues. *See id.* at 770, 122 S. Ct. at 2532. Here, the political conduct during a campaign is at issue. There simply is no real difference between the two – in both cases political speech was at issue.

Defendants also again advance the argument that in New York State The Canons of Judicial Ethics have a long-standing tradition of guiding judicial conduct. This is merely a reiteration of the arguments made previously, and does nothing to support a finding of a strong likelihood of success on the merits. *See Schwartz,* 159 F.R.D. at 383.

Finally, defendants argue for the first time that the applicable provisions are not vague because the Chief Administrator established a panel to issue Advisory Opinions that set forth specific factual guides which create a presumption of proper conduct if followed. This argument presupposes that every possible factual scenario is covered by the Advisory Opinions. Notably, defendants do not cite to any Advisory Opinion similar to the fact patterns of the charges against Spargo. Moreover, even if the supposition were accurate, it does not alter the fact that the actual provisions of the Code in question are insufficiently specific to put judges and judicial candidates on notice as to what conduct is prohibited, and defendants cite no authority to support use of such extraneous materials in finding vague provisions constitutional. In fact, requiring judicial candidates and duly elected or appointed judges to seek an advisory opinion from a panel before speaking or acting – for fear of disciplinary action and sanctions – appears to be the ultimate in prior restraint. It

clearly places further limitations upon their conduct and First Amendment rights.

III. CONCLUSION

No irreparable injury will inure to defendants if a stay is denied. Substantial harm to the plaintiffs will result from granting a stay. The public interest lies with denying a stay, preventing constitutional violations. Defendants have not established an extremely high likelihood of success on the merits. Therefore, consideration of the four required factors leads to the conclusion that the stay must be denied.

Accordingly, it is

ORDERED the defendants' motion for a stay pending appeal is DENIED.

IT IS SO ORDERED.

/s/ David N. Hurd
United States
District Judge

Dated: April 29, 2003
Utica, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS J. SPARGO,
JANE McNALLY, and
PETER KERMANI,

Plaintiffs,

-v- 1:02-CV-1320

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, individually and as Administrator of the State Commission on Judicial Conduct, and HENRY T. BERGER, individually and as Chairperson of the New York State Commission on Judicial Conduct,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

(Filed Feb. 20, 2003)

I. THE PARTIES

Plaintiff Thomas J. Spargo ("Spargo") is currently a Supreme Court Justice for the Third Judicial District of the State of New York. He was an attorney in private practice specializing in election law before his foray into elective politics. In the fall of 1999 Spargo campaigned for election to the position of Town Justice for the Town of Berne, in Albany County, New York. He was elected and assumed that position on January 1, 2000. In 2001 Spargo, a Republican, campaigned for election to his current position. He was cross-endorsed by the Democratic, Independence, and Conservative Parties. His campaign was successful and he assumed his current position on January 1, 2002.

Plaintiff Jane McNally ("McNally") is a recently retired public service employee. She is a life-long Democrat and has been active in campaigns as well as party affairs for many years. McNally became acquainted with Spargo in the late 1980's in the course of his work regarding highly contested Democratic primary challenges. Spargo and McNally worked together frequently regarding political activities. In 2001, McNally worked with Spargo on his campaign for election to Supreme Court Justice. McNally was a delegate to the Democratic Party nominating convention that year, and she nominated Spargo for endorsement by her party. The nomination was successful and he was cross-endorsed.

Plaintiff Peter Kermani ("Kermani") is the chairperson of the Albany County Republican Party. He supported Spargo's candidacies. He indicates that he would like to

invite Spargo or other judicial candidates or judicial officers to speak to his organization but feels constrained not to do so because it may subject them to sanctions.

Defendant Gerald Stern is the Administrator of the New York State Commission on Judicial Conduct ("Commission"). The administrator is a member of the bar who is appointed by the Commission and serves at its pleasure. N.Y. Jud. L. § 41(7) (McKinney's 2002). Defendant Henry T. Berger is the chairperson of the Commission.

II. PROCEDURAL HISTORY

Spargo, McNally, and Kermani filed the complaint in this matter pursuant to 42 U.S.C. § 1983 challenging the facial and as applied constitutionality of certain sections (as described in detail below) of the New York Code of Judicial Conduct and seeking declaratory and injunctive relief. Plaintiffs' allegations stem from a Formal Written Complaint dated January 25, 2002 ("Complaint"), and a Supplemental Formal Written Complaint dated May 13, 2002 ("Supplemental Complaint"), brought against Spargo by Stern in his capacity as Administrator and Counsel to the Commission. Essentially plaintiffs allege that certain sections of the Code of Judicial Conduct infringe upon their free speech, association, and equal protection rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution.

A hearing on the charges set forth in the Complaint and the Supplemental Complaint was set to begin on October 21, 2002, and continue to October 24, 2002, as agreed by the parties. In early October Spargo sought a change of venue for the hearing from New York City to Albany. The Commission did not oppose; therefore, venue

was changed to Albany. As a result, the assigned Referee withdrew. A new Referee was designated on October 8, 2002. On October 10, 2002, Spargo requested an adjournment until December 2002. The Referee denied the request, indicating that the hearing would occur as scheduled. On October 15, 2002, Spargo renewed his request for an adjournment. Plaintiffs filed this action on October 17, 2002.

On October 17, 2002, an Order to Show Cause with Temporary Restraining Order signed by Hon. Lawrence E. Kahn, United States District Judge, was filed. The Temporary Restraining Order enjoined defendants from taking any action with respect to the Complaint and Supplemental Complaint. A hearing was set down for October 23, 2002, to entertain plaintiffs' motion for a preliminary injunction. The hearing was changed to October 25, 2002, upon random assignment to the undersigned. On October 25, 2002, the Temporary Restraining Order was extended by consent of the parties. Plaintiffs' motion for a preliminary injunction was set down for a hearing on November 29, 2002. An Order was issued on November 7, 2002, advancing and consolidating trial of the action on the merits with the hearing of plaintiffs' application for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a). The parties were given an opportunity to object to the advancement and consolidation; however, no objections were made.

Plaintiffs' submissions in support of their motion for a preliminary injunction were filed at the time the action was initiated. Defendants filed opposition to the motion for a preliminary injunction. Plaintiffs then filed a list of proposed witnesses and exhibits for the consolidated trial. Plaintiffs also filed a reply memorandum of law in further

support of their motion, along with twelve affidavits. Defendants objected to plaintiffs' presentation of witnesses at the trial. Defendants further moved in limine to preclude consideration of the twelve reply affidavits.

Plaintiffs reply affidavits were accepted.[1] However, plaintiffs were precluded from presenting testimony at the trial upon a finding that no facts were in controversy and the matter for decision was one strictly of law that could be decided upon the submissions.

Oral argument was heard on November 29, 2002, in Utica, New York. Decision was reserved.

III. BACKGROUND

A. Development of the Code of Judicial Conduct

The American Bar Association ("ABA") adopted the first Canons of Judicial Ethics in 1924. Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 1.02 (3d ed. 2000). These original Canons were meant as an "ideal guide of behavior, rather than an enforceable set of rules." *Id.* There was no method of enforcement unless each state adopted one. By constitutional amendment in 1947, New York created a special Court on the Judiciary to hear cases of judicial misconduct or disability, and to mete out sanctions. *Id.* § 1.03. The only sanction available to the Court on the Judiciary was removal. *Id.* The Court on the

[1] It was noted that although the affidavits were accepted as a part of the record, many relate to the merits of the charges against Spargo and therefore are irrelevant to the issues of law presented.

Judiciary met for the first time in 1959, twelve years after it was created. *Id.* While apparently creating a mechanism for enforcement of the Canons of Judicial Ethics, it was ineffective in doing so.

In 1972 the ABA promulgated the Model Code of Judicial Conduct in order to specify mandatory and enforceable rules for judicial comportment. *Id.* § 1.02. The New York State Bar Association adopted the ABA Model Code in 1973, with some amendments. Marjorie E. Gross, *Updated Rules on Judicial Conduct,* 215 N.Y. L.J. 1 (May 14, 1996). Judges' conduct was also governed by the Rules Governing Judicial Conduct of the Chief Administrator of the Courts, 22 NYCRR Part 100. *Id.* There was still no effective mechanism for investigating and sanctioning misconduct.

In 1977, the New York State Constitution was amended to establish a Commission on Judicial Conduct ("Commission") to receive, initiate, investigate, and hear complaints regarding the conduct, qualifications, and performance of judges within the unified court system.[2] N.Y. Const. Art. 6 § 22 (McKinney's 2001 & Supp. 2003). This was the first effective mechanism in New York State to investigate complaints of misconduct against judges.

In 1990 the ABA promulgated the Revised Model Code of Judicial Conduct, revising some specific details and adding new specific details. *Judicial Conduct and Ethics, supra,* § 1.02. New York adopted a combination of the 1972

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[2] At the same time, the section that established the Court on the Judiciary was repealed. N.Y. Const. Art. 6 § 22 Historical Notes (McKinney's 2001).

and 1990 ABA Model Codes, *id.*, which became effective in 1996, Gross, *supra.*

The current New York Code of Judicial Conduct as adopted by the New York State Bar Association, comprised of five general canons of conduct along with specific rules under each canon, is set out in an appendix to the Judiciary Law, McKinney's Book 29. It is also set forth in Part 100 of the Rules of the Chief Administrator of the Courts, found in McKinney's New York Rules of Court, and is codified in Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York.[3]

B. The Commission on Judicial Conduct

The Commission is made up of eleven appointed members. N.Y. Jud. L. § 41 (McKinney's 2002). The initial members were appointed to terms varying from one to four years. *Id.* Thereafter, the member's terms were four years. *Id.* A combination of members of the bar, judges, and non-members of the bar comprise the Commission. *Id.* The Commission is authorized and directed to adopt rules to carry out its duties.[4] *Id.* § 42.

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[3] The Code of Judicial Conduct, Judicial Conduct Rules of the Chief Administrator of the Courts, and Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York are identical except that the Preamble appears only in the Code of Judicial Conduct. For simplification they are referenced generally as the "Rules" or specifically as "22 NYCRR § xx."

[4] The Standard Operating Procedures and Rules of the State Commission on Judicial Conduct are set forth in N.Y. Comp. Codes R. & Regs. tit. 22 § 7000 (McKinney's 2003 New York Rules of Court) (hereinafter 22 NYCRR § 7000).

Available sanctions include admonishment, censure, and removal from office "for cause, including, but not limited to, misconduct in office, persistent failure to perform his [or her] duties, [and] habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice." *Id.* § 44(1). A judge may also be "retired for mental or physical disability preventing the proper performance of his judicial duties." *Id.* Further, a judge may be suspended from office by the Court of Appeals upon its own motion or a recommendation by the Commission. *Id.* § 44(8).

The Commission may initiate an investigation based upon receipt of a written and signed complaint from an external source. *Id.* § 44(1). However, if it is determined that the complaint lacks merit on its face, it may be dismissed. *Id.* The complainant is always notified of the disposition. *Id.* § 44(11).

The Commission may also, on its own initiative, initiate an investigation with the filing of a complaint. *Id.* § 44(2). In the course of its investigation and hearing of a complaint (initiated either internally or externally), the Commission may "administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation." *Id.* § 42. During the investigation or hearing, if the Commission finds that other action is warranted, such as referral to a district attorney's office, it must refer the complaint or allegations along with supporting evidence to the appropriate authority. *Id.* § 44(10).

The Commission may designate a panel of three of its members or a referee, who is a member of the bar but not a member of the Commission, to carry out its duties. *Id.* § 43. A panel may perform any of the functions and duties of the Commission except conduct hearings and determine disposition of the matter. *Id.* § 43(1). A referee is "empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the referee may deem relevant or material to the subject of the hearing." *Id.* § 43(2).

In the course of an investigation the appearance of the involved judge may be required upon written notice. *Id.* § 44(3). The judge has a right to representation by counsel and to present evidence. *Id.* A transcript is made of any testimony or statements made under oath and the judge may obtain a copy of the transcript free of charge. *Id.*

If the Commission determines in the course of its investigation that a hearing is warranted, a formal written complaint must be served upon the involved judge. *Id.* § 44(4). The judge must file a written answer within twenty days. *Id.* The judge is entitled to copies, without charge, of all documents the Commission intends to present at the hearing and any written statements made by witnesses the Commission intends to call. *Id.* The judge is also entitled to any relevant exculpatory material. *Id.*

The hearing is not public unless the judge makes a written demand. *Id.* The involved judge has a right to be represented by counsel, to cross-examine the Commission's witnesses, and to present relevant evidence and witnesses.

Id. A transcript is made of the hearing and kept with the Commission records. *Id.*

Alternatively, a hearing may be waived upon an agreement on a statement of facts, subject to the approval of the Commission. *Id.* § 44(5). If the hearing is waived, then the Commission makes its determination based upon the formal written complaint, the judge's answer, and the agreed statement of facts. *Id.*

If a referee has conducted the investigation and hearing, the Commission considers the referee's report and recommendation and determines whether misconduct has been established. 22 NYCRR § 7000.7. The Commission provides an opportunity for the submission of briefs and oral argument regarding the report and recommended sanctions. *Id.*

At any time after a formal written complaint is issued the Commission determines that no further action is required, it must dismiss the complaint and notify the judge of the dismissal. N.Y. Jud. L. § 44(6).

The Commission may determine, after a hearing, that the involved judge be admonished, censured, removed, or retired. *Id.* § 44(7). The Commission may, in the alternative, determine that the misconduct does not warrant those sanctions and instead issue "a letter of caution containing confidential comments, suggestions and recommendations with respect to the formal written complaint." 22 NYCRR § 7000.7.

The Commission must forward its written determination that a prescribed sanction is appropriate along with findings of fact, conclusions of law, and the record of the proceedings, to the Chief Judge of the Court of Appeals.

N.Y. Jud. L. § 44(7). A copy must also be served upon the involved judge. *Id.* Upon completion of service, the determination, findings of fact, conclusions of law, and record of proceedings become public. *Id.* The judge may accept the determination or make a written request for review to the Chief Judge. *Id.*

If the determination is admonishment or censure and the judge accepts it or fails to request a review then the Commission will issue the admonishment or censure. *Id.* If the determination is removal or retirement and the judge accepts it or fails to request a review then the Court of Appeals orders the removal or retirement. *Id.*

Upon acceptance of review by the Chief Judge, the Court of Appeals reviews the Commission's findings of fact and conclusions of law on the record of the Commission proceedings. *Id.* § 44(9). The record to be reviewed consists at a minimum of

> all complaints, whether formal or informal or merely initiatory, except that [the involved judge] or the Commission may apply to the court for good cause shown to exclude irrelevant initiatory material; any answer or other pleading or an agreed statement of facts; and the written determination, findings and conclusions and record of proceedings upon which the determination is based, including all record and documentary evidence or material before the Commission in the making of its determination.

22 NYCRR § 530.2. The involved judge must file a brief as well as the record for review. *Id.* The Commission must also file a brief, and the involved judge may file a reply brief. *Id.* At the conclusion of its review the Court of Appeals may accept or reject the sanction determined

appropriate by the Commission, impose a different sanction, or impose no sanction. N.Y. Jud. L. § 44(9).

IV. THE COMPLAINT AND SUPPLEMENTAL COMPLAINT AGAINST SPARGO

The Complaint and the Supplemental Complaint allege five specific charges of misconduct against Spargo. He answered denying the material allegations of violations and asserted that his conduct was protected by the United States and New York State Constitutions.

Note that whether Spargo actually engaged in the conduct alleged to violate the Rules is irrelevant for the purpose of this decision. It is also irrelevant to this decision, if Spargo did engage in the conduct, whether such conduct constituted a violation of the Rules. No opinion is offered as to whether the alleged activity of Spargo, if true, would bring disrespect to the judiciary.

A. Charge 1

Charge 1 alleges violations of sections 100.1, 100.2(A), and 100.5(A)(4)(a) of the Rules, as follows:

> [Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety, failed to respect and comply with the law and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; and, as a candidate for judicial office, failed to maintain the dignity appropriate to judicial office and to act in a manner consistent with the integrity and independence of the judiciary. . . .

(Kunz Aff. Oct. 16, 2002, Ex. A ¶ 7.) These allegations of violations are based upon several events that occurred in October and November 1999 while Spargo was campaigning for the election of Justice of the Berne Town Court.

It is alleged that Spargo offered items of value to induce votes on his behalf. Specifically, the allegations are that on two occasions Spargo handed out coupons that could be redeemed for free donuts and coffee in a local convenience store; on one occasion he distributed coupons redeemable for $5.00 in gasoline to the first five motorists who drove up to a local convenience store; on four or five occasions, he introduced himself as a candidate for Town Justice and purchased a round of drinks for everyone at the bar of a local restaurant; on several occasions he introduced himself as a candidate for Town Justice and handed out fifty half-gallons of cider and donuts to town residents at the town dump; on several occasions he gave pizzas to teachers at a local school, town highway personnel, town barn personnel, school bus garage personnel, and patrons of a local store. The total value of the items given away is estimated to be $2,000.00.

B. Charge 2

Charge 2 alleges violations of sections 100.1, 100.2(A), 100.2(C), 100.3(E)(1), and 100.4(D)(1)(a)-(c),[5] as follows:

> [Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the

[5] Note that Spargo does not challenge the constitutionality of sections 100.2(C), 100.3(E)(1), and 100.4(D)(1)(a)-(c) with regard to Charge 2.

> appearance of impropriety, failed to respect and comply with the law and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; conveyed the impression that the District Attorney was in a special position to influence the judge . . . ; failed to disqualify himself in proceedings in which the judge's impartiality might reasonably be questioned . . . ; and engaged in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position and involve the judge in a continuing business relationship with an attorney likely to come before the court. . . .

(Kunz Aff. Oct. 16, 2002, Ex. A ¶ 10.) These allegations are based upon Spargo presiding as Town Justice over criminal cases from the fall of 2000 through August 2001 that were prosecuted by the Albany County District Attorney's Office without making certain disclosures and obtaining a remittal of disqualification. Specifically, it is alleged that Spargo should have disclosed to the defense that he had represented the campaign of the District Attorney-elect and that the campaign owed him $10,000 for the legal services rendered.

C. Charge 3

Charge 3 alleges violations of sections 100.1, 100.2, and 100.5(A)(1)(c), (d), (e), as follows:

> [Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; engaged in partisan political activity

> . . . ; participated in a campaign for political office other than his own . . . ; and publicly endorsed other candidates for political office. . . .

(Kunz Aff. Oct. 16, 2002, Ex. A. ¶ 13.) The basis for this charge is that Spargo, while Town Justice, allegedly attended governmental sessions for the recount of presidential votes in Miami-Dade County, Broward County, and Palm Beach, Florida, as an observer for the Republican Party and the George Bush/Richard Cheney presidential campaign. The Commission further alleges that "with the aim of disrupting the recount process, [Spargo] participated in a loud and obstructive demonstration against the recount process outside the offices of the Miami-Dade County Board of Elections." *Id.* ¶ 11.

D. Charge 4

Charge 4 alleges violations of sections 100.1, 100.2(A), and 100.5(A)(1)(c), (d), (f), (g), as follows:

> [Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; engaged in partisan political activity . . . ; permitted his name to be used in connection with the activities of a political organization . . . ; made a speech on behalf of a political organization . . . ; and attended a political gathering. . . .

(Kunz Aff. Oct. 16, 2002, Ex. A. ¶ 15.) This charge stems from Spargo allegedly attending a fund-raising event, the 39th Annual Monroe County Conservative Party Dinner, on May 18, 2001, and serving as keynote speaker at that

event, while he was a Town Justice and Candidate for Supreme Court Justice.

E. Supplemental Charge

The supplemental charge alleges violations of sections 100.1, 100.2(A), and 100.5(A)(4)(a), as follows:

> [Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety, failed to respect and comply with the law and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; as a candidate for judicial office, [Spargo] failed to maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . . ; and [Spargo] conveyed the appearance that he paid Ms. McNally and Mr. Connolly for their efforts to obtain his nomination for public office, in violation of Section 158(3) of the Election Law. . . .

(Kunz Aff. Oct. 16, 2002, Ex. C ¶ 7.) This charge is based upon payments allegedly made by Spargo's judicial campaign committee to consultants involved in his campaign for Supreme Court Justice. Specifically, $5,000 was allegedly paid to McNally, who nominated Spargo as the Democratic Party's candidate for Supreme Court Justice although McNally had volunteered her services, did not expect to be paid, and did not request payment. A campaign disclosure statement listed the $5,000 debt to McNally as being owed for consulting services incurred on the same date as McNally made the nomination. It is further alleged that $5,000 was paid to a consulting firm,

the principal of which was chair of the Rensselaer County Independence Party and a delegate to the Independence Party Judicial Nominating Convention and had supported and worked for Spargo's nomination as the Independence Party candidate, although there was no legal obligation to make such payment.

V. CHALLENGED CODE PROVISIONS

Spargo challenges the constitutionality of sections 100.1, 100.2(A), 100.5(A)(1)(c), (d), (e), (f), (g), and 100.5(A)(4)(a) of the Rules. The challenged provisions are set forth below.

> § 100.1 A Judge Shall Uphold the Integrity and Independence of the Judiciary
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.
>
> § 100.2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
>
> (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . .

§ 100.5 A Judge or Candidate for Elective Judicial Office Shall Refrain From Inappropriate Political Activity

(A) Incumbent Judges and Others Running for Public Election to Judicial Office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

. . .

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

. . .

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

. . . .

22 NYCRR §§ 100.1 to 100.5.

VI. DISCUSSION

A. Abstention

Defendants contend that as a matter of law their affirmative defense of abstention has been demonstrated. Plaintiffs argue that abstention is inappropriate because their federal constitutional claims cannot be adequately addressed in the proceeding pending before the Commission.

There is "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 431, 102 S. Ct. 2515, 2521 (1982) (citing *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971)). There is a three-prong test to determine whether a federal court should abstain pursuant to the *Younger* doctrine. *See id.* at 432, 102 S. Ct. at 2521. First, the state proceeding must be judicial in nature. *Id.* at 433-34, 102 S. Ct. at 2522. Second, an

important state interest must be implicated by the proceeding. *Id.* at 434, 102 S. Ct. at 2522. Finally, the constitutional claims must be determinable in the state proceeding. *Id.* at 435, 102 S. Ct. at 2523. If all three prongs are affirmative, then the federal court must abstain unless there is a "showing of bad faith, harassment, or other extraordinary circumstances that would make abstention inappropriate." *Id.* at 436, 102 S. Ct. at 2523.[6]

McNally and Kermani are not judges or judicial candidates and therefore are not subject to the Commission's authority. Accordingly, their constitutional claims cannot be determined in the Commission proceeding to which they are not parties. Defendants contended at oral argument that derivative claims, such as those brought by McNally and Kermani, are not cognizable in an action brought under section 1983. *See Jackson v. Johnson,* 118 F.Supp.2d 278, 286 (N.D.N.Y. 2000), *aff'd in part & dismissed in part,* 13 Fed. Appx. 51 (2d Cir. 2001). However, McNally and Kermani each assert individual claims that the challenged sections of the Rules chill their individual speech and association and are therefore unconstitutional. *See Steffel v. Thompson,* 415 U.S. 452, 474-75, 94 S. Ct. 1209, 1223-24 (1974) (holding that on its face or as applied challenge will lie although there is no pending

[6] Plaintiffs make no claim that the Commission proceeding is not judicial in nature, does not implicate an important state interest, or that there is bad faith, harassment, or other extraordinary circumstances.

state court proceeding).[7] Therefore, abstention is not appropriate as to McNally and Kermani.

The only abstention issue with regard to Spargo is whether the misconduct proceedings before the Commission afford an adequate opportunity to determine the constitutional challenges.[8] The Commission has authority to "receive, initiate, investigate, and hear complaints regarding the conduct, qualifications, and performance of [state court] judges." N.Y. Const. Art. 6 § 22. By its plain language the Commission's authority does not include entertaining constitutional challenges to the Rules.

Defendants contend that a judge or judicial candidate facing misconduct charges may raise unconstitutionality as a defense, thus bringing a constitutional issue within the purview of the Commission. While at first glance this seems plausible, further consideration reveals several difficulties.

First, if charges are lodged but are later found to be unsubstantiated, or for any other reason the Commission determines not to proceed, the complaint is dismissed. *See* N.Y. Jud. L. § 44(6). Upon dismissal of a complaint, the

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[7] Defendants have not challenged the standing of McNally and Kermani to bring a direct (as opposed to derivative) constitutional challenge to the specified Rules. Their facial challenge to the specified Rules will lie since they have asserted that enforcement of the Rules has chilled their right to free speech and association. *See id.*

[8] Defendants' sole argument in this regard is that the Commission proceedings, and any appeal from the Commission's determination, provide Spargo an adequate opportunity to determine the constitutional issues. They do not argue that there is any other state proceeding, such as Article 78, that would provide plaintiffs with a judicial proceeding in which their constitutional claims could be determined.

record and all relevant materials would remain sealed. *See id.* §§ 44-45. The purported offender's constitutional challenge would go unheard.

Second, the assertion that there is necessarily a review of any Commission finding by the Court of Appeals is debatable.[9] There is a provision that upon an adverse determination by the Commission the judge "may . . . make written request to the chief judge [of the court of appeals] . . . for a review." *Id.* § 44(7). It is further provided that "in its review of a determination of the commission, the court of appeals shall review the commission's" findings and determination. *Id.* § 44(9). Defendants rely upon the "shall review" language in support of their reading that review is mandatory. However, the language is not so clear that it could not be read to the contrary, that is, that review is discretionary rather than mandatory. Use of the phrase "may . . . request" indicates that the Chief Judge can grant or deny the request. In common usage, when there is a request it is not automatically granted; it may be denied. The following scenario is well within the language of the provision. A judge, disagreeing with the Commission, makes a written request to the Chief Judge for a review. The Chief Judge denies the request. The Court of Appeals has no review before it so the provision that "in its review of a determination of the commission,

[9] It is noted that the question whether a challenge to a disciplinary determination is as of right or discretionary may be more properly answered by the New York Court of Appeals. However, there is no provision for a District Court to certify such a question to the state's highest court. *See* McKinney's New York Rules of Court § 500.17(b) (2003) (permitting United States Court of Appeals to certify dispositive question of law to the New York Court of Appeals).

the court of appeals shall review" is not offended. Only *if* the Chief Judge granted the request for review *must* the full court review the Commission's findings and determination.

No case law has been cited to support defendants' reading that review is mandatory. Moreover, the Court of Appeals is limited to "review the commission's findings of fact and conclusions of law *on the record of the proceedings* upon which the commission's determination was based." N.Y. Jud. L. § 44(9) (emphasis added). The Commission's findings of fact consist of what conduct did occur. The conclusions of law consist of an application of the Rules to the facts as found to determine if the conduct violated the Rules. Consideration of the validity of the Rules themselves is outside the scope of the Commission's authority despite any constitutional defense brought by the judge.

Further, the record of the Commission is made in the course of its investigation. (Kunz Aff. Nov. 25, 2002, Ex. A at 2.) Any hearing is not a trial, and rules of evidence do not apply. *Id.* The resultant record would necessarily be spare, less than ideal for consideration of a constitutional question of import not only statewide but nationwide as well. Additionally, where, as here, the constitutional challenges are summarily rejected or ignored, without analysis or discussion, *see id.* Ex. B, a full review of the constitutional questions would be impossible because of the scant record. *See In re Shaw,* 96 N.Y.2d 7, 12 (2001) (per curiam) (reiterating that upon review of Commission's determination, court is limited to the record at the time of the determination).

The Commission proceedings against Elizabeth Shanley ("Shanley") and her subsequent appeal illustrate

this point. Misconduct charges were brought against Shanley regarding her campaign for election as a Town Justice in the Town of Esopus, in Ulster County, New York. *In re Shanley,* 98 N.Y.2d 310, 311 (N.Y. 2002) (per curiam). Ms. Shanley had campaigned as a "law and order" candidate, which the Commission found objectionable.[10] *Id.* at 312. She challenged the misconduct charges on the basis of her First Amendment right to free speech. (Pisani Aff. ¶¶ 3-4.) The Commission found that her conduct violated sections 100.1, 100.2(A),[11] 100.5(A)(4)(d)(i)-(ii) and admonished her. In the Matter of Elizabeth A. Shanley, (Dec. 27, 2001), http://www.scjc.state.ny.us/shanley.htm. The Commission made findings of fact and conclusions of law, never mentioning Shanley's constitutional challenge. *Id.* Upon review, the Court of Appeals found that Shanley's conduct did not offend the Rules, again without mention of her First Amendment challenge. *In re Shanley,* 98 N.Y.2d at 312. Thus, Shanley's constitutional challenge on First Amendment grounds went undetermined.

Third, it appears that the Court of Appeals has never undertaken a constitutional challenge to the Rules on review of a Commission determination. Defendants cite *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597 (1980) (per curiam), as a case in which the Court of

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[10] She also distributed campaign literature that was misleading regarding her educational credentials. *Id.* at 311. That conduct was not subject to constitutional challenge and therefore is not discussed further.

[11] Sections 100.1 and 100.2(A) are two of the sections challenged in this action.

Appeals addressed constitutional issues. However, *Nicholson* involved a challenge to the Commission's authority to investigate the conduct of a judicial candidate/judge. *Id.* at 603. Nicholson, the former campaign manager for the judge being investigated, moved to quash a subpoena issued to him. *Id.* at 603-04. Other former campaign workers were also subpoenaed. *Id.* at 604. The Commission moved to compel the other campaign workers to comply with the subpoenas. *Id.* at 605. Nicholson and the others also brought a Writ of Prohibition seeking to enjoin the Commission from continuing the investigation. *Id.* at 605. The court first determined that seeking a Writ of Prohibition in an Article 78 proceeding was proper. *Id.* at 606-07. The *Nicholson* Court then turned to the merits and found that although a chilling of freedom of speech and association may occur, the state interest in the integrity and impartiality of the judiciary was overriding thus the Commission could investigate misconduct by the judiciary. *Id.* at 608-10. In other words, the Constitution did not preclude an investigation of improper fund raising and judicial favoritism.

Nicholson thus presented a very different procedural posture than what is presented in the instant case.[12] Rather than reaching the constitutional question in the course of the disciplinary proceeding, the question was addressed in the context of an Article 78 proceeding. *See* 50 N.Y.2d at 610. The *Nicholson* Court merely found that

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[12] Here the plaintiffs are challenging specific Rules and not the right of the Commission to investigate and discipline. In fact, the plaintiffs concede that the Commission has the authority to proceed with Charge 2 regardless of this decision. (*See* Tr. at 16-17.)

an investigation into judicial misconduct was constitutional. *Id.* It did not consider a constitutional challenge to the Rules in the context of a disciplinary proceeding. Therefore it provides no support for the assertion that the Court of Appeals has considered such a constitutional challenge.

Defendants have not cited any other cases in which the Court of Appeals (or for that matter the Commission) has undertaken analysis of a constitutional challenge to either the Rules in general or to any specific Rules, and none have been found. It is fallacious to argue that abstention is appropriate because plaintiffs necessarily have an opportunity to be heard in state proceedings, when in the history of state court proceedings no such claim has ever been heard.

Accordingly, because plaintiffs do not have an adequate opportunity to have their constitutional claims determined in the state disciplinary proceeding, abstention is not appropriate or necessary.

B. Equal Protection

A state may not deny a person equal protection of the laws. U.S. Const. amend. XIV, § 1. Similarly situated persons must be treated alike. *Zahra v. Town of Southold,* 48 F.3d 674, 683 (2d Cir. 1995). At issue here are the restrictions placed upon candidates for judicial office. No such restrictions are placed upon candidates for other public offices.

Unlike other public offices, the judiciary must independently, fairly, and competently interpret and apply the laws of the state. *See* N.Y. Judiciary Law, Code of Judicial Conduct, Preface (McKinney's Supp. 2003). The

Conduct, Preface (McKinney's Supp. 2003). The judicial office is a public trust that must be respected and honored. *See id.*

> There is a critical difference between the work of a judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.

Republican Party of Minnesota v. White, ___ U.S. ___, 122 S. Ct. 2528, 2547 (2002) (Stevens, J., dissenting). An important consideration in a judicial campaign, absent from campaigns for other public office, is remaining free from bias or preconceived determinations that may endure upon assuming the bench. *See id.* at 2542 (O'Connor, J., concurring) (discussing the difficulty of maintaining impartiality with an elected judiciary).

Judicial candidates and candidates for other public office are not similarly situated. Accordingly, treating them differently is constitutionally permissible. The restrictions placed upon judges and judicial candidates do not deny them equal protection of the laws.

C. Applicability of § 1983

Defendants argue that plaintiffs' section 1983 claims must be dismissed against the Commission and the individual defendants in their official capacities due to Eleventh Amendment immunity. Suits against the state generally are barred by the Eleventh Amendment. *Estes-El v. Town of Indian Lake,* 954 F.Supp. 527, 536 (N.D.N.Y.

1997). However, declaratory and prospective injunctive relief are available. *Kostok v. Thomas,* 105 F.3d 65, 69 (2d Cir. 1997). Plaintiffs' claims brought under 42 U.S.C. § 1983 need not be dismissed.

D. First Amendment

Plaintiffs challenge sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) as impermissible prior restraints.[13] They further contend that all of the challenged sections are unconstitutionally vague. They challenge sections 100.5(A)(1)(d)-(f) as unconstitutionally overbroad. Defendants argue that the specified sections constitute permissible prior restraints and are not unconstitutionally vague or overbroad.

1. Prior Restraint

The parties agree that sections 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) constitute a prior restraint. The issue is whether this prior restraint on political activity is constitutionally permissible.

A prior restraint on protected speech "'bear[s] a heavy presumption against its constitutional validity.'" *Fantasy Book Shop, Inc. v. City of Boston,* 652 F.2d 1115, 1120 (1st Cir. 1981) (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558, 95 S. Ct. 1239, 1246 (1975)). Such a prior restraint is constitutionally permissible only

[13] While plaintiffs contend that all challenged sections constitute impermissible prior restraints, sections 100.1 and 100.2(A) are more properly evaluated for vagueness.

if it is narrowly tailored to serve a compelling state interest. *White,* 122 S. Ct. at 2534. A prior restraint is narrowly tailored where "it does not 'unnecessarily circumscrib[e] protected expression.'" *Id.* at 2535 (quoting *Brown v. Hartlage,* 456 U.S. 45, 54, 102 S. Ct. 1523, 1529 (1982)). Defendants bear the burden of demonstrating that the interest is compelling and that it is narrowly tailored. *See id.* at 2534-35.

Defendants assert that the state interest to be served is an independent judiciary. (*See* Tr. at 52-54.) Defendants distinguish independence from impartiality, the asserted justification for the prior restraint in *White. Id.* at 54.

In *White,* a Minnesota provision prohibiting judicial candidates from announcing "'views on disputed legal or political issues'" was at issue. 122 S. Ct. at 2531 (quoting Minn.Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000)). After reciting the strict scrutiny standard for application in cases of prior restraint of protected speech, the Court determined the meaning of impartiality. *Id.* at 2534-35.

The Court first looked to a dictionary to find that in this context impartiality could mean "the lack of bias for or against either *party,*" assuring "equal application of the law." *Id.* at 2535. The Court noted that while the lower appellate court also referenced the interest in an "independent" judiciary, the parties appeared to use the terms independent and impartial interchangeably. *Id.* at 2535 n.6. When applying strict scrutiny, the Court found that the announce clause was not narrowly tailored to serve impartiality in the sense of bias for or against a party. *Id.* at 2535. Rather, the announce clause restricted speech regarding *issues. Id.*

The Court then conceded that another possible, albeit uncommon, meaning of impartial in this context could be "lack of preconception in favor of or against a particular *legal view.*" *Id.* at 2536. The announce clause was an impermissible prior restraint using this meaning because "avoiding judicial preconceptions on legal issues is neither possible nor desirable, [and] pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either." *Id.*

Finally the Court examined a third possible, also uncommon, meaning of impartial, open-mindedness. *Id.* The Court rejected respondents' argument that the announce clause was put in place to assure the open-mindedness of the judiciary. *Id.*

Here defendants do not suggest what they mean by "independent judiciary." They merely assert that maintaining an "independent judiciary" is a compelling state interest served by the sections of the code of conduct at issue.

Plaintiffs seem to consider the articulated purpose of judicial independence as a compelling state interest. Accordingly, it will be accepted as such. Next it must be determined exactly what is meant by judicial independence, and if the challenged sections of the Rules are narrowly tailored to achieve it. *See id.* at 2535.

a. Judicial Independence

According to Black's, independent means "[n]ot subject to the control or influence of another." Black's Law Dictionary 774 (7th ed. 1999). A secondary meaning is

"[n]ot associated with another (often larger) entity." *Id.* A tertiary meaning is "[n]ot dependent or contingent on something else." *Id.* The Preamble to the Rules may also be instructive. It avers that the Rules "be construed so as not to impinge on the essential independence of judges in making judicial decisions." The Preamble language indicates that in this context independence means outside the control or influence of another. It cannot mean not associated with a larger entity, such as a political party, because that is contrary to a system of partisan elections. It also cannot mean contingent upon something else, in this context.

In other words, the compelling state interest purportedly served by the Rules is to preserve judicial independence, that is, the ability of judges to make their decisions free of the control or influence of other persons or entities.

b. Political Activity

Section 100.5(A), applicable to judges and judicial candidates, generally prohibits "inappropriate political activity." The challenged subdivisions more specifically prohibit engaging in partisan political activity except with regard to the candidate's own campaign, participating in a political campaign or using the judge's name in a campaign, endorsing or opposing any candidate, giving speeches on behalf of political organizations or candidates, and attending political gatherings. 22 NYCRR §§ 100.5(A)(1)(c)-(g). Further, section 100.5(A)(4)(a) directs candidates to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and [] encourage members of the candidate's family to adhere to the same standards of political conduct

in support of the candidate as apply to the candidate." Essentially these Rules prohibit judges and judicial candidates from any political activity except their own judicial campaign.

Defendants do not suggest how avoiding the delineated "inappropriate" conduct furthers the goal of maintaining the independence of the judiciary. The only conceivable connection would be that engaging in political activity, whether partisan or nonpartisan, would influence a judge's decision toward or against the view espoused, whether it be on an issue of law or as to a party to a proceeding. In other words, engaging in political activity would create a bias either for or against an issue of law or a party thus undermining the judge's independence. In that context, the Rules prohibiting participation in political activities would prevent bias, leading to the ultimate goal of preserving judicial independence. Even if this attenuated connection was valid, it does not save the Rules.

The United States Supreme Court has determined that a rule prohibiting announcing views on disputed legal or political issues is not narrowly tailored to serve the compelling interest of a judiciary free from bias. *White,* 122 S. Ct. at 2535. Here the prohibitions are even broader than prohibiting specific speech, such as views on legal or political issues as in *White.* Again, here judges and judicial candidates are essentially precluded from participating in politics at all except to participate in their own election campaigns. Moreover, a wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate. *See id.* at 2536-37 (noting that

lawyers who have preconceived views on legal issues before becoming judges are experienced rather than biased; one with no preconceived ideas would be unqualified). There is no support for the proposition that one-time participation in political activity impedes the making of independent judgments any less than current participation in some political activity might.

Moreover, if a judge were influenced, or biased, against or for a party to a proceeding, for political reasons or otherwise, the proper consequence would be recusal. To demonstrate this principal, imagine a lawyer becoming good friends with her neighbor. The lawyer becomes a judge, and the friendship continues. The neighbor inherits property that is contaminated with hazardous substances. An action to recover clean-up costs is initiated, naming the neighbor as a defendant. This judge is assigned the case. Because she is friends with one of the named defendants, she recuses herself. Perfectly appropriate. A rule prohibiting judges (or judicial candidates) from being friends with their neighbors would not narrowly serve the state's interest in an independent judiciary. Likewise, a rule prohibiting an elected judge or judicial candidate from participating in politics is not narrowly tailored to serve the state's interest in an independent judiciary. This is particularly true in light of the political process by which judges are elected. *See generally id.* at 2542-44 (O'Connor, J., concurring) (criticizing the elective method of selecting judges.)

C. Tradition

Defendants urge that a "'long-established' tradition of prohibiting certain conduct," such as political activity by

judges and judicial candidates, "creates 'a strong presumption' that the prohibition is constitutional." *See id.* at 2540. Defendants assert that the Code of Judicial Conduct was first adopted in New York in 1909, thus standing as a long-established tradition. (Defts.' Mem. at 20.) No authority is cited.[14] Defendants go so far as to state that "New York stands as an exception to the general conclusion of the Supreme Court that codes for regulating judicial conduct did not begin to develop until the latter half of the 20th century. *White,* 122 S. Ct. at 2540." *Id.*

This assertion is more than misleading; it is inaccurate. In fact, the Supreme Court was completely correct in stating that codes of judicial conduct were first developed in the latter half of the twentieth century. *See Judicial Conduct and Ethics, supra,* § 1.03. In 1924 the ABA first adopted Canons of Judicial Ethics "as a guide and reminder for judges, indicating what the people have a right to expect from them." Lisa L. Milord, American Bar Association, *The Development of the ABA Judicial Code* 132 (1992). New York created a special court in 1947 to consider and sanction judicial misconduct, but it was ineffectual. *Judicial Conduct and Ethics, supra,* § 1.03. It was not until 1972 that a Code of Conduct meant to be enforceable was promulgated. *Id.* § 1.02. In 1973, New York adopted the ABA's Model Code of Judicial Conduct, with some modifications. Gross, *supra.* There was no effective method of enforcing the Code until the constitutional

[14] Actually, the New York Judiciary Law itself was enacted in 1909. 3 Birdseye's Cumming & Gilbert Consolidated Laws of New York 2713 (1909). However, no code of judicial conduct is incorporated or appended.

changes that created the Commission on Judicial Conduct. N.Y. Const. Art. 6 § 22. Thus, there is not a long-standing tradition of effectively regulating judicial conduct. Further, when long-standing tradition of prohibiting conduct creating a presumption of constitutionality is discussed, it is done in the context of whether a certain prohibition would have been considered constitutional (or not) at the time of the framing, or historically, *see, e.g., White,* 122 S. Ct. at 2540; *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-43, 115 S. Ct. 1511, 1516-17 (1995), and not just in the recent past.

In sum, there is no long-standing tradition to create a presumption of constitutionality in this case. Even if there were such a presumption, that would have to be considered in light of the core First Amendment speech at issue here. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" including "uninhibited, robust, and wide-open" debate on candidate and issue-based elections. *McIntyre,* 514 U.S. at 346-47, 115 S. Ct. at 1519. Thus, even in the face of any tradition, a restriction on the core right to make political speech must be narrowly tailored to meet a compelling state interest. *Id.* at 347, 115 S. Ct. at 1519 (stating that a restriction on core political speech will be upheld "only if it is narrowly tailored to serve an overriding state interest"). The burden on the core political speech of judges and judicial candidates imposed by these sections of the Code of Judicial Conduct are not narrowly tailored to serve an overriding state interest.

Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) are void as impermissible prior restraints upon the rights guaranteed by the First Amendment.[15]

2. Vagueness

Sections 100.1 and 100.2(A) are affirmative directives to judges which are designed to preserve an honorable, independent, and impartial judiciary. The issue is whether such general guides may form the basis for specific formal charges against a judge.

"[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). First, a rule must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.,* 92 S. Ct. at 2298-99. Second, a rule must have specific standards so that those who enforce it cannot do so arbitrarily and discriminatorily. *Id.* at 108-09, 92 S. Ct. at 2299. Third, a rule that impedes basic First Amendment freedoms, if vague, leads those whose conduct is affected to more severely limit their conduct in order to avoid a violation. *Id.* at 109, 92 S. Ct. at 2299.

Section 100.1 requires a judge to "uphold the integrity and independence of the judiciary." Further, the "judge should participate in establishing, maintaining and enforcing high standards of conduct, and [] personally

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[15] Plaintiffs also make an overbreadth challenge to sections 100.5(A)(1)(d)-(f). Given the finding that these sections constitute impermissible prior restraints, an overbreadth analysis is unnecessary.

observe those standards so that the integrity and independence of the judiciary will be preserved." 22 NYCRR § 100.1. First, the language of this rule provides no reasonable opportunity for a person of any level of intelligence to know what conduct would be prohibited. *See Grayned,* 408 U.S. at 108, 92 S. Ct. at 2298-99. In fact, each of the charges of misconduct lodged against Spargo, ranging from handing out donuts to attending the Florida presidential election recounts to making improper payments for nominations, includes an alleged violation of § 100.1.

Second, section 100.1 completely lacks specificity. *See Grayned,* 408 U.S. at 108-09, 92 S. Ct. at 2299. The Commission may exercise complete discretion when determining what conduct fails to "uphold the integrity and independence of the judiciary." There is no objective standard upon which to evaluate what conduct violates the provision, or, for that matter, what conduct is sufficient to meet its directive of upholding integrity and independence. Certainly one could identify conduct that would plainly denigrate the integrity and independence of the judiciary, for example, murder and mayhem, or bribery. However, when faced with conduct short of the extreme, such as handing out donuts, it is a purely subjective determination by the Commission. Defendants characterize handing out donuts as "unseemly." They assert that Spargo's handing out donuts is different than serving coffee and cake at a reception where a candidate is introduced. How would anyone know that handing out donuts would constitute a failure to uphold the integrity and independence of the judiciary while serving cake would not? Finally, this broad directive would tend to lead judges to severely restrict their conduct, lest they be

accused of failing to "uphold the integrity and independence of the judiciary."

Section 100.2(A) requires a judge to "respect and comply with the law and [] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A person of ordinary intelligence would undoubtedly know that this section forbids unlawful conduct. *See Grayned,* 408 U.S. at 108, 92 S. Ct. at 2298-99. However, a person of ordinary intelligence could not know what conduct does or does not constitute acting "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *See id.* From reading this phrase there simply is no way to determine permissible and impermissible conduct, short of the extreme. Again, each and every charge of misconduct against Spargo cites this provision which again demonstrates that the Commission's enforcement of this provision must be arbitrary and subjective, for lack of any specific, objective standards to apply. *See id.* at 108-09, 92 S. Ct. at 2299.

Defendants argue that Spargo cannot challenge these provisions as vague because they unquestionably apply to his conduct. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562 (1974) (stating, "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). However, when the challenge is grounded in the First Amendment, there is an exception to this general principle that a facial challenge is precluded.[16] *Id.*

[16] Defendants citation to *Parker* in support of the proposition that Spargo is prohibited from a vagueness challenge is misleading. After stating the aforementioned principle and the First Amendment

(Continued on following page)

at 759, 94 S. Ct. at 2563. Spargo's challenge is, of course, grounded in the First Amendment. Accordingly, a vagueness analysis is not precluded on this ground.

Sections 100.1 and 100.2(A) are void for vagueness.[17]

VII. CONCLUSION

Abstention under the *Younger* doctrine is inappropriate because plaintiffs do not have an adequate opportunity to have their constitutional claims determined in the state court proceeding. *See Middlesex County Ethics Committee,* 457 U.S. at 434-35, 102 S. Ct. at 2522-23. The Eleventh Amendment does not preclude plaintiffs' claims for declaratory and injunctive relief pursuant to § 1983. The challenged sections of the Code of Judicial Conduct do not violate equal protection. Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) are not narrowly tailored to serve a compelling state interest and therefore are void as invalid prior restraints upon plaintiffs' First Amendment rights. *See White,* 122 S. Ct. at 2534. Sections 100.1 and 100.2(A) are

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exception, the *Parker* Court found that the "weighty countervailing policies" that justified the exception in the civilian context were not present in the military context. *Id.* at 760-61, 94 S. Ct. at 2564. Accordingly, the Court found that since the conduct at issue clearly fell within the prohibition of the Uniform Code of Military Justice, plaintiff, a commissioned officer, could not mount a vagueness challenge. *Id.* The Court did not find, as defendants suggest, that in the context of a civilian, such as Spargo, the general rule (rather than the exception) applies.

[17] Plaintiffs challenge sections 100.5(A)(1)(c), 100.5(A)(1)(g) and 100.5(A)(4)(a) as void for vagueness. However, a vagueness analysis is unnecessary given the finding that sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) are invalid prior restraints.

void for vagueness because they do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, do not have specific standards, and lead judges and judicial candidates to more severely limit their conduct in order to avoid a violation. *See Grayned,* 408 U.S. at 108-09, 92 S. Ct. at 2298-99. The plaintiffs are entitled to a permanent injunction.

The effect of the permanent injunction is that the defendants may not proceed against Spargo on Charges 1, 3, 4, and the Supplemental Charge because those charges allege violations of only the void sections of the Rules. The defendants may proceed against Spargo on Charge 2 to the extent that the allegations are of violations of sections 100.2(C), 100.3(E)(1), and 100.4(D)(1)(a)-(c), which were not constitutionally challenged.

Accordingly, it is

ORDERED that

1. Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the Code of Judicial Conduct appended to the New York Judiciary Law as set forth in the Rules of the Chief Administrator of the Courts and Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York (NYCRR) are facially unconstitutional; and

2. Defendants are PERMANENTLY ENJOINED and RESTRAINED from enforcing sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the Code of Judicial Conduct appended to the New York Judiciary Law as set forth in the Rules of the Chief Administrator of the Courts and Title 22 of the Official Compilation of Codes, Rules & Regulations of the State of New York (NYCRR).

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

/s/ David N. Hurd
United States District
Judge

Dated: February 20, 2003
Utica, New York

22 NYCRR § 100 (2004) Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct PREAMBLE

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and

maintaining high standards of judicial and personal conduct.

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22 NYCRR § 100.0 (2004) Terminology

The following terms used in this Part are defined as follows:

(A) A candidate is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authories [sic] solicitation or acceptance of contributions.

(B) Court personnel does not include the lawyers in a proceeding before a judge.

(C) The degree of relationship is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, aunt [sic], brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) Economic interest denotes ownership of a legal or equitable interest, however small, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest, of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(E) Fiduciary includes such relationships as executor, administrator, trustee, and guardian.

(F) Knowingly, knowledge, known or knows denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) Law denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) Member of the candidate's family denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) Member of the judge's family denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) Member of the judge's family residing in the judge's household denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) Nonpublic information denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A part-time judge, including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) Political organization denotes a political party, political club or other group, the principal purpose of which is to

further the election or appointment of candidates to political office.

(N) Public election includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(O) Require. The rules prescribing that a judge require certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term require in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) Rules; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part" – refers to Part 100

"section" – refers to a provision consisting of 100 followed by a decimal (100.1)

"subdivision" – refers to a provision designated by a capital letter (A).

"paragraph" – refers to a provision designated by an arabic numeral (1).

"subparagraph" – refers to a provision designated by a lower- case letter (a).

(Q) "Window Period" – denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly

solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

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22 NYCRR § 100.1 (2004) a judge shall uphold the integrity and independence of the judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part are to be construed and applied to further that objective.

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22 NYCRR § 100.2 (2004) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor

shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

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22 NYCRR § 100.3 (2004) A judge shall perform the duties of judicial office impartially and diligently

(A) Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require

similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the

judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph

does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(10) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(C) Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall

refrain from recommending a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other members of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(iv) is likely to be a material witness in the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(f) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or

as a fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (l)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

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22 NYCRR § 100.4 (2004) A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations

(A) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) detract from the dignity of judicial office; or

(3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

(B) Avocational activities. A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part.

(C) Governmental, civic, or charitable activities.

(1) A full-time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2)(a) A full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(b) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of

an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

(a) A judge shall not serve as an officer, director, trustee or nonlegal advisor if it is likely that the organization

(i) will be engaged in proceedings that ordinarily would come before the judge, or

(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;

(ii) may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a court employee organization, bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;

(iii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice; and

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position,

(b) involve the judge with any business, organization or activity that ordinarily will come before the judge, or

(c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge, subject to the requirements of this Part, may hold and manage investments of the judge and members of the judge's family, including real estate.

(3) A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:

(a) the foregoing restriction shall not be applicable to a judge who assumed judicial office prior to July 1, 1965, and maintained such position or activity continuously since that date; and

(b) a judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial resources of the judge or members of the judge's family; and

(c) any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or

family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in subdivision 100.4(H) of this section.

(E) Fiduciary activities.

(1) A full-time judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of the judge's family,

or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(3) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from paragraphs (1) and (2) during the period of such interim or temporary appointment.

(F) Service as arbitrator or mediator. A full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(G) Practice of law. A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.

(H) Compensation, reimbursement and reporting.

(1) Compensation and reimbursement. A full-time judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) a school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law.

(2) Public Reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of $150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial Disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

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22 NYCRR § 100.5 (2004) A judge or candidate for elective judicial office shall refrain from inappropriate political activity

(A) Incumbent Judges and Others Running for Public Election to Judicial Office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in section 100.0 of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by section 100.5(A)(5), shall not authorize or knowingly permit any person to do

for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs 100.5(A)(4)(a) and (d).

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the Window Period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(B) Judge as Candidate for Nonjudicial Office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's Staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activities including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

22 NYCRR § 100.6 (2004) Application of the Rules of Judicial Conduct

(A) General Application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-Time Judge. A part-time judge:

(1) is not required to comply with sections 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

(C) Administrative Law Judges. The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.

(D) Time for Compliance. A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to sections 100.4(D)(3) and 100.4(E), such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail, except that these rules shall apply to a non-judge candidate for elective judicial office only to the extent that they are adopted by the New York State Bar Association in the Code of Judicial Conduct.

(2)

Supreme Court, U.S.
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No. 03-1273

IN THE

Supreme Court of the United States

THOMAS J. SPARGO, JANE McNALLY,
and PETER KERMANI,

Petitioners,

v.

NEW YORK COMMISSION ON JUDICIAL CONDUCT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the *Younger* abstention doctrine may be applied to claims brought in federal court that are unavoidably intertwined and inseparable from claims asserted in a pending state proceeding, where one plaintiff in the federal action is a party to the state proceeding, but the others are not.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Background	1
B. Decisions Below	4
Reasons for Denying the Petition	7
I. The Second Circuit's Application of *Younger* Abstention Is Consistent With the Decisions of This Court.	7
II. The Second Circuit's Application of *Younger* Abstention Is Consistent With the Decisions of Other Circuit Courts of Appeal.	10
III. New York's Judicial Conduct Rules Plainly Are Not "Flagrantly and Patently Violative of Express Constitutional Prohibitions."	16
IV. This Case Presents a Poor Vehicle For Considering the Scope of *Younger* Abstention	17
Conclusion	20

TABLE OF CITED AUTHORITIES

CASES *Page*

Arnett v. Kennedy,
416 U.S. 134 (1974) 17

Casa Marie v. Superior Ct. of Puerto Rico,
988 F.2d 252 (1st Cir. 1992) 13, 14

Cedar Rapids Cellular Tel. v. Miller,
280 F.3d 874 (8th Cir. 2002) 11, 12

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413 U.S. 548 (1973) 17

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975) ..... *passim*

Green v. City of Tucson,
255 F.3d 1086 (9th Cir 2001) 12, 13

Hicks v. Miranda,
422 U.S. 332 (1975) ..... *passim*

In re Raab,
100 N.Y.2d 305, 793 N.E.2d 1287 (N.Y. 2003) .. 5, 9, 17

In re Watson,
100 N.Y.2d 290, 794 N.E.2d 1 (N.Y. 2003) ... 5, 9, 17

Middlesex Co. Ethics Comm. v. Garden St. Bar Ass'n,
457 U.S. 423 (1982) 5, 9

Cited Authorities

Page

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey St. Bd. of Higher Educ., 654 F.2d 868 (3d Cir. 1981) 13, 14, 15

Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001), *rev'd*, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) 1, 16, 17, 18, 19

Richards v. Jefferson County, 517 U.S. 793 (1996) 8, 9

Robinson v. Stovall, 646 F.2d 1087 (5th Cir. 1981) 10, 11

South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) 8, 9

Women's Cmty. Health Ctr. v. Texas Health Facilities Comm'n, 685 F.2d 974 (5th Cir. 1982) 11

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

Cited Authorities

Page

STATE STATUTES, RULES, AND REGULATIONS

N.Y. Judiciary Law § 44(7) 5, 19

N.Y. Judiciary Law § 212(2)(l) 17

22 N.Y.C.R.R. § 100.0 1

22 N.Y.C.R.R. § 100.1 ..... 2, 3

22 N.Y.C.R.R. § 100.2(A) 2, 3

22 N.Y.C.R.R. § 100.5(A) ..... *passim*

22 N.Y.C.R.R. § 7000.7(c) 19

STATEMENT OF THE CASE

Petitioners Thomas J. Spargo, an elected New York state judge, and two of his political supporters, Jane McNally and Peter Kermani, challenged the constitutionality of various provisions of New York's Rules Governing Judicial Conduct ("Rules"), 22 N.Y.C.R.R. §§ 100.0 *et seq.*, claiming that they are facially invalid in light of this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The United States Court of Appeals for the Second Circuit, applying the abstention principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, declined to consider the merits of petitioners' First Amendment claims, and vacated the district court's judgment permanently enjoining enforcement of the challenged Rules by respondent New York State Commission on Judicial Conduct ("Commission"). While Spargo does not contest the Second Circuit's decision to abstain from adjudicating his own constitutional claims, McNally and Kermani seek review of the court's application of *Younger* to their claims.

A. Background

In 1999, Spargo ran a successful campaign for the position of Town Justice of Berne, New York. Pet. App. 6. In 2001, running on the Republican, Democratic, and Independence Party lines as a cross-endorsed candidate, he was elected to his current position as Justice of the Supreme Court for the Third Judicial District of the State of New York. *Id.*

In January 2002, the administrator of the Commission served upon Spargo a four-count complaint charging him with violating various provisions of the Rules. *Id.* Charge I of

that complaint alleges that in the course of his campaign for Town Justice, Spargo violated 22 N.Y.C.R.R. § 100.1 (regarding judicial independence), § 100.2(A) (regarding judicial impartiality), and § 100.5(A)(4)(a) (prohibiting unauthorized political activity) by offering a variety of items of value to town residents to induce them to vote for him. Pet. App. 6-7. Charge II alleges that in the fall of 2000, Spargo violated numerous Rules, including §§ 100.1 and 100.2(A),[1] by accepting the Albany County District Attorney-Elect as a client, even though the District Attorney's office regularly appeared in criminal cases before Spargo in his capacity as Town Justice. Pet. App. 7. Charge II further alleges that Spargo improperly presided over criminal cases prosecuted by the Albany County DA's office without disclosing to defense counsel that he previously had represented the District Attorney, and that the DA's campaign committee still owed him $10,000 in legal fees. *Id.* Charge III alleges that Spargo violated §§ 100.1, 100.2(A), and 100.5(A)(1)(c)-(e)[2] by attending, as a Republican Party and Bush/Cheney campaign observer, "'governmental sessions for the recount of presidential votes'" in 2000 in Florida, and by participating in a widely-publicized "'loud and obstructive demonstration'" outside the offices of the local elections

1. Charge II of the complaint also alleges that Spargo violated other provisions of the Rules, the constitutionality of which he has not challenged. Pet. App. 68 n.5.

2. These provisions prohibit a judge or judicial candidate from: (1) engaging in any partisan political activity, other than participating in his or her own campaign for elective judicial office, 22 N.Y.C.R.R. § 100.5(A)(1)(c); (2) permitting his name to be used in connection with any activity of a political organization, § 100.5(A)(1)(d); and (3) publicly endorsing or publicly opposing (other than by running against) another candidate for public office, § 100.5(A)(1)(e).

board with the aim of disrupting that recount process. Pet. App. 7. Charge IV alleges that Spargo violated §§ 100.1, 100.2(A), and 100.5(A)(1)(c)-(g)[3] by serving as the keynote speaker at the 39th Annual Monroe County Conservative Party Dinner, a fundraising event, at a time when he was a sitting judge, and not a candidate for elective office. Pet. App. 7-8.

In May 2002, the Commission administrator served upon Spargo a supplemental one-count complaint that charged him with violating §§ 100.1, 100.2(A), and 100.5(A)(4)(a) by authorizing his campaign committee to make two $5,000 payments not required by law. Pet. App. 8. One of these payments was a disbursement of $5,000 to petitioner Jane McNally, a longtime Democratic Party operative and volunteer for Spargo's election campaign who harbored no expectation of being paid for her services. *Id.* That disbursement was made after McNally had nominated Spargo as the Democratic Party's candidate for Supreme Court Justice. *Id.*

A hearing on the disciplinary charges was scheduled to commence before a Commission-designated referee on October 21, 2002, but on October 17, 2002, Spargo instituted an action in the United States District Court for the Northern District of New York seeking to invalidate §§ 100.1, 100.2(A), 100.5(A)(4)(a), and 100.5(A)(1)(c)-(g) as unconstitutional and to permanently enjoin the Commission from enforcing those provisions. Pet. App. 8-9.

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3. Section 100.5(A)(1)(f) prohibits a judge or judicial candidate from making speeches on behalf of a political organization or another candidate. Section 100.5(A)(1)(g) prohibits judges or judicial candidates from attending political gatherings.

Joining Spargo as plaintiffs were McNally and Peter Kermani, chairperson of the Albany County Republican Party. McNally alleged that the Commission's actions adversely affected her because "'the threat of sanctions against Spargo,'" as well as the possibility of like threats against other unnamed political candidates she might support in the future, "'impedes her freedom of speech, including her ability and desire to nominate and show support for particular candidates'" as a Democratic delegate at future party nominating conventions. *Id.* at 9-10. Likewise, Kermani alleged that "'as a member and chairman of the Republican party, he is restrained from associating with Spargo'" and other unnamed judicial candidates "'out of concern that [the] association would adversely impact Spargo.'" *Id.* at 10 (brackets in original). Kermani also alleged that he "'declined to invite Spargo'" and unnamed others to address his organization, "'despite a desire to do so, out of concern that such activity would result in [additional] charges being brought against Spargo.'" *Id.* (brackets in original).

B. Decisions Below

The district court found *Younger* abstention inapplicable, declared the challenged provisions of the Rules facially unconstitutional, and enjoined the Commission from enforcing them. Pet. App. 74-96. In explaining its refusal to abstain, the court noted that because McNally and Kermani were neither judges nor judicial candidates, they were not subject to the Commission's authority, and therefore the Commission's proceeding against Spargo would not resolve their constitutional challenges to the contested Rules. *Id.* at 75. The district court also suggested that while McNally and Kermani lacked standing "deriv[ed]" from Spargo's claims, they nevertheless had "direct" standing.

Id. at 76 n.7. The court further opined that the Commission's proceeding would not provide an adequate opportunity for judicial review of Spargo's constitutional claims, finding it "debatable" whether mandatory review was available to him in the New York Court of Appeals, *see* N.Y. Judiciary Law § 44(7) (Consol. 2004), the State's court of last resort. Pet. App. 77.

On appeal, the Second Circuit vacated the judgment, and remanded with instructions to abstain under *Younger*. The court noted that in two decisions rendered in June 2003 – *In re Watson*, 100 N.Y.2d 290, 794 N.E.2d 1 (N.Y. 2003), and *In re Raab*, 100 N.Y.2d 305, 793 N.E.2d 1287 (N.Y. 2003) – the New York Court of Appeals "erased any doubt as to the mandatory nature of its review" of Commission determinations, and confirmed that "judges and judicial candidates subject to disciplinary proceedings have the opportunity to raise First Amendment challenges before the [New York] Court of Appeals." Pet. App. 15; *see also id.* at 27. The court concluded that because Spargo, like the petitioner in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), had an adequate opportunity for judicial review of his federal constitutional claims in the ongoing state proceeding against him, *Younger* precluded the federal courts from considering the merits of his constitutional challenge to the Rules. Pet. App. 21-28.

As to McNally's and Kermani's claims, the Second Circuit found them "unavoidably intertwined and inseparable" from Spargo's. *Id.* at 38. The court explained:

> [T]he rights of recipients of speech (such as McNally and Kermani) derive in the first instance from the primary rights of the speaker. As a result,

> McNally and Kermani may claim no greater First Amendment protection than Spargo, and their success on the merits is entirely derivative of whatever rights that Spargo may have to engage in the prohibited speech and political activity. . . . McNally's and Kermani's claims are largely the mirror-image of Spargo's First Amendment challenge, and it would be impossible for the District Court to analyze [their] claims independently without first analyzing Spargo's constitutional right to engage in the charged conduct, a matter which, under *Younger*, must be resolved in the pending state disciplinary proceeding.

Pet. App. 36-38 (citations and internal punctuation omitted). The court also suggested that McNally's and Kermani's efforts to evade the *Younger* bar were at odds with their proffered reasons for having standing to press their claims: "Throughout this litigation, plaintiffs have relied almost exclusively on their close relationship with Spargo to establish an interest in the challenged judicial rules, and therefore, cannot now seek to downplay the connection to prevail on *Younger* grounds." Pet. App. 37-38 n.19.

Because of the intertwined nature of petitioners' claims, the Second Circuit found abstention applicable to McNally and Kermani, as well as to Spargo: "[T]his case presents one of the narrow circumstances in which *Younger* may properly extend to bar claims of third-parties who are not directly involved in the pending state action." Pet. App. 38-39. The court further found that the case for abstention "is particularly strong as to McNally, as Spargo is specifically charged with authorizing an improper payment" to her. *Id.* at 39 n.20.

The Second Circuit also questioned whether McNally and Kermani even had standing to bring claims regarding the speech of other unidentified judges or judicial candidates. The court noted that while alleging in a "conclusory fashion" that they had "refrained from associating with and supporting other judges and judicial candidates because of the disciplinary charges against Spargo," McNally and Kermani "have not specifically identified any other judges or judicial candidates who wish to engage in allegedly prohibited speech or political activity." *Id.* at 37 n.19. "[N]or does the record demonstrate that there is a likelihood of future disciplinary action" against any such person. *Id.* Because standing based on the speech of others requires "a willing speaker," the court concluded, the absence of such allegations raised "substantial doubt" about McNally and Kermani's standing and the ripeness of their claims. *Id.* (internal quotations omitted).

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S APPLICATION OF *YOUNGER* ABSTENTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Contrary to petitioners' contentions, the Second Circuit's application of *Younger* abstention to McNally's and Kermani's constitutional challenges to the Rules is fully consistent with this Court's precedents.

As the Second Circuit noted, *see* Pet. App. 33-34, this Court has held that *Younger* may bar a federal court's adjudication of claims that would interfere with a pending state proceeding, even where the federal action is brought by a "third party" not involved in the state proceeding. In *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court held

that the federal courts could not decide the claims of two theater owners who sought to enjoin enforcement of a state obscenity statute, given that a state court criminal prosecution under that statute was pending against two of the theater's employees. Abstention was appropriate, the Court found, because the interests of the federal plaintiffs and state court defendants were "intertwined," and "the federal action sought to interfere with the pending state prosecution." *Id.* at 348-49. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court reaffirmed that where a plaintiff not a party to an ongoing state proceeding nevertheless is "closely related" to a party in that proceeding, *Younger* abstention is warranted. 422 U.S. at 928. On the facts of that case, however, the Court found that *Younger* posed no bar because the plaintiffs in *Doran* were unrelated "in terms of ownership, control, and management" to the party involved in the state proceeding. *Id.* at 929.

The Second Circuit's decision faithfully applies the *Hicks/Doran* framework. Its conclusion that McNally's and Kermani's claims more closely resemble the third-party claims in *Hicks*, rather than those in *Doran*, rests solely on the court's assessment of the closeness of their relationship with Spargo. Pet. App. 38-39. There is therefore no basis for claiming that the Second Circuit's legal analysis departs from that used in *Hicks* or *Doran*.

Petitioners' contention, *see* Pet. 8, 11-12, that the Second Circuit's decision conflicts with *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *South Central Bell Telephone Company v. Alabama*, 526 U.S. 160 (1999), is untenable. Significantly, those cases involve the application of res judicata, not *Younger* abstention. *Richards* and *South Central Bell* also differ from the instant case because they involve

non-parties who were "strangers" to the parties involved in litigation. *See Richards*, 517 U.S. at 802; *South Central Bell*, 526 U.S. at 168. In contrast, McNally and Kermani can hardly be characterized as "strangers" to Spargo; the Second Circuit found their claims "inseparable" from and "derivative" of Spargo's. Pet. App. 38, 40-41. In any event, *Richards* and *South Central Bell* both acknowledge that the interests of a non-party may be sufficiently aligned with those of a party so as to result in significant legal consequences to the non-party. *Richards*, 517 U.S. at 799, 802; *South Cent. Bell Tel.*, 526 U.S. at 167-68 (res judicata may apply where a "special relationship" exists between two sets of plaintiffs, one of which was not a party to a proceeding).

Petitioners also complain, *see* Pet. 2, 18, 20, that the court below answered a question left unresolved in *Middlesex* – namely, whether *Younger* applies to a third-party who is not a party to a state disciplinary proceeding. In *Middlesex*, this Court merely directed the circuit court to determine if abstention was appropriate given the facts of that particular case, *see* 457 U.S. at 437 n.17; *Hicks* and *Doran* already had set forth the legal standard for making that decision. In any event, even if there was an open legal question, a lower federal appellate court's resolution of such an issue would be unexceptional.[4]

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4. Petitioners also suggest that the decision below is at odds with *Middlesex* on the ground that New Jersey's highest court supposedly entertains constitutional challenges to that state's judicial conduct rules, but New York's highest court does not. *See* Pet. 19, 24. However, the New York Court of Appeals and the Second Circuit have found that both the Commission and the New York Court of Appeals itself can and do consider constitutional challenges to New York's Rules. *See Watson*, 100 N.Y.2d at 298, 794 N.E.2d at 4; *Raab*, 100 N.Y.2d at 312-13, 793 N.E.2d at 1289-90; Pet. App. 15, 27.

II. THE SECOND CIRCUIT'S APPLICATION OF *YOUNGER* ABSTENTION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

Petitioners appear to seek error correction from this Court, rather than expressly asserting a split among the circuits regarding the application of *Younger* to "third-party" claims. To the extent the petition's references to the decisions of other circuits can nonetheless be read to imply the existence of a square conflict, *see* Pet. 12-15, none exists. The cases to which petitioners cite utilize the same analysis articulated in *Hicks* and *Doran* and employed by the Second Circuit below. That other circuits have declined to abstain from deciding third-party claims in certain instances demonstrates only that abstention is appropriate in some factual circumstances but not others; it does not reveal any inconsistency among the legal standards adopted by the various circuits.

Petitioners point to *Robinson v. Stovall*, 646 F.2d 1087 (5th Cir. 1981), in which the Fifth Circuit found that *Younger* abstention did not bar a constitutional challenge to a parade ordinance brought by plaintiffs who never had been arrested under its provisions, even though state court prosecutions for violating the ordinance were pending against other plaintiffs. 646 F.2d at 1090. The Fifth Circuit's decision was based largely on its conclusion that the relationship between the non-arrested federal plaintiffs and the plaintiffs subject to pending state prosecutions was attenuated: "Instead of a close groups of activists, this case presents a loose organization of several hundred members and an unknown

number of 'supporters.'" *Id.* at 1092. The Second Circuit, in contrast, found that McNally, Kermani, and Spargo shared a close relationship and mutual interests, and concluded that abstention therefore was required. Pet. App. 38-39.[5]

In any event, just one year after *Robinson*, the Fifth Circuit unequivocally held in *Women's Community Health Center of Beaumont v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982), that *Younger* can bar "third-party" claims. It abstained from hearing the claims of federal plaintiffs, including two doctors and three pregnant women, who challenged an ongoing state court enforcement proceeding against a medical facility that offered abortions, even though those plaintiffs were not parties to the state court proceeding. 685 F.2d at 981-82. While "the general rights of the plaintiff women and doctors in making the abortion decision are legally distinct from any rights the [health center] may assert," the court held that "*Younger* cannot be avoided simply by joining nonparties to the state court proceeding in order to procure injunctive and declaratory relief against that proceeding." 685 F.2d at 982.

The decision below is also fully consistent with the Eighth Circuit's ruling in *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874 (8th Cir. 2002), cited by petitioners. *See* Pet. 12. In that case, the Eighth Circuit applied *Younger* abstention to the claims of two federal plaintiffs, providers

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5. *Robinson* also differs from this case in two other ways. First, the Fifth Circuit identified "no contention that [the non-arrested plaintiffs] lack standing," *id.* at 1090, but the Second Circuit below questioned McNally's and Kermani's standing, Pet. App. 37 n.19. Second, the Fifth Circuit stressed that plaintiffs in that case sought only "prospective relief," *Robinson*, 646 F.2d at 1090-91, in contrast to McNally and Kermani, who seek to directly enjoin the ongoing state proceeding against Spargo, Pet. App. 39.

of wireless telephone services, who sought declaratory and injunctive relief prohibiting enforcement of a state consumer protection statute against them. 280 F.3d at 881-82. The court did so for two reasons: first, because these two providers were closely related in terms of common ownership to another wireless service provider against whom a state enforcement action had been commenced, and second, because any injunction they might obtain in federal court would create a "serious possibility of interference" with the ongoing state proceeding. *Id.* at 882. Conversely, the court found *Younger* abstention did not apply to the claims of a third provider who "[did] not seek to interfere with the proceeding in state court" and who lacked a similarly "close relationship" with the plaintiff involved in the state court proceeding. 280 F.3d at 882.

As with the other cases cited by petitioners, the outcome in *Cedar Rapids* turns on the facts of the case; the legal standard employed by that court is consistent with that used by the Second Circuit below. Indeed, the Eighth Circuit expressly noted that *Younger* could bar "third-party" claims: "It is not a prerequisite to *Younger* abstention that the federal plaintiffs also be defendants in the action pending in state court." 280 F.3d at 881. Thus, "parties in federal and state court need not be identical where the interests of the parties seeking relief in federal court are closely related to those of the parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings." 280 F.3d at 882 (internal citations and quotations omitted) (citing *Hicks*, 422 U.S. 332).

The Ninth Circuit's decision in *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir 2001) (*en banc*), also applies the same *Hicks/Doran* framework used by the Second Circuit.

In *Green*, one set of plaintiffs brought a state court action challenging the constitutionality of a state statute regarding the incorporation of cities and towns. Another group of plaintiffs – who, unlike McNally and Kermani, were unrelated to the state court plaintiffs – brought an independent action in federal court raising the same constitutional claims. 255 F.3d at 1090-91. These plaintiffs did not "seek to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings," *id.* at 1098, but instead simply requested declaratory relief that likely would have affected the state proceeding. The Ninth Circuit concluded that the "[c]ongruence of interests" shared by both sets of plaintiffs was alone not enough to divest a federal court of jurisdiction under *Younger*. 255 F.3d at 1100. It explicitly acknowledged, however, the same legal conclusion adopted by the Second Circuit – that "a party whose interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable may, under *Younger*, not proceed." 255 F.3d at 1100.

Finally, petitioners make much of the Second Circuit's reference to two decisions from the First and Third Circuits, which discuss application of *Younger* to challenges brought by individuals who were not parties to pending state court proceedings. *See* Pet. 13-14 (citing *Casa Marie v. Superior Court of Puerto Rico*, 988 F.2d 252 (1st Cir. 1992), and *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey St. Bd. of Higher Educ.*, 654 F.2d 868 (3d Cir. 1981)). Neither of these cases squarely conflicts with the decision below.

In *Casa Marie*, the First Circuit found that *Younger* applied to the claims of federal plaintiffs who were not parties

to a state court proceeding, but subsequently sought to enjoin a decree issued in that litigation. 988 F.2d at 267-68. In discussing the *Hicks/Doran* framework, the court noted that while there might be "some instances" in which *Younger* could not be applied to "a federal plaintiff who was not a party, or not 'closely related' to a party, in the pending state court proceeding," there "plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them." 988 F.2d at 266 (quoting *Doran*, 422 U.S. at 928-29).[6] The First Circuit did suggest that plaintiffs who were unable to intervene in pending state court proceedings would not be subject to an abstention bar. 988 F.2d at 267 (citing *New Jersey-Philadelphia Presbytery*, 654 F.2d at 882). But because the third-party plaintiffs in *Casa Marie* were, in fact, able to intervene in the ongoing state proceeding, this statement was merely *dictum* and cannot serve as the basis of a conflict among the circuits.

In *New Jersey-Philadelphia Presbytery*, the Third Circuit held that federal plaintiffs, who sought to challenge the constitutionality of a school licensing scheme and enjoin enforcement of a state court order in furtherance of that scheme, were not precluded under *Younger* because they were not parties to an ongoing state court proceeding addressing the same issue. 654 F.2d at 877. Essential to the Third Circuit's holding, however, was its characterization of the relationship between the "third-party" plaintiffs and the state court plaintiff: "Each of these plaintiffs has asserted

6. The First Circuit observed that *Younger* did not bar parallel challenges to the constitutionality of a state statute brought by "unrelated, legally distinct parties," 988 F.2d at 267-68, as did the Second Circuit below, *see* Pet. App. 35-36 (citing, *inter alia*, *Casa Marie*, 988 F.2d at 267-68).

individual first and fourteenth amendment rights distinct from those" asserted by the party to the state court proceeding. *Id.* As such, the court found that "the nonparties here do not fall within the *Hicks-Doran* 'nexus' with the state defendants" that would otherwise prohibit their federal action. 654 F.2d at 880. The Third Circuit, however, affirmed that "there might be cases in which nonparty plaintiffs might be precluded from bringing a federal action . . . because they might be so interrelated . . . that pursuit of a separate federal action would undermine *Younger*." 654 F.2d at 880. The court noted that in *Hicks*, *Younger* abstention was properly applied to bar the federal action because the "first amendment right" of the employees derived from "their . . . assert[ion of] the employer's right to show the film." 654 F.2d at 878.

That is precisely the circumstance here, for the Second Circuit found that McNally's and Kermani's claims "are essentially derivative" of Spargo's. Pet. App. 38. The court below noted that McNally and Kermani "do not assert independent First Amendment rights [distinct from Spargo's], nor do they bring truly separate challenges to the judicial conduct rules." *Id.* at 36. On this basis, and consistent with *Hicks*, the Second Circuit concluded that "*Younger* may properly extend to bar claims of third-parties who are not directly involved in the pending state action." Pet. App. 38-39.

III. NEW YORK'S JUDICIAL CONDUCT RULES PLAINLY ARE NOT "FLAGRANTLY AND PATENTLY VIOLATIVE OF EXPRESS CONSTITUTIONAL PROHIBITIONS."

Petitioners claim that the Second Circuit's application of *Younger* abstention was improper because New York's Rules are "'flagrantly and patently violative of express constitutional prohibitions.'" Pet. Br. 22 (quoting *Younger*, 422 U.S. at 53-54). This contention is completely meritless. The challenged Rules are fully constitutional, and petitioners' lengthy arguments on this point, *see* Pet. 21-30, are nothing more than a thinly-disguised effort to have this Court reach out to resolve their constitutional claims.

In any event, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), upon which petitioners primarily rely, *see* Pet. 21-25, does not control this case. In *White*, this Court invalidated Minnesota's "announce" clause, which prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." *Id.* at 768. New York's Rules do not include an "announce" clause, and the Rules that govern a judicial candidate's speech in the course of a campaign are not at issue here.[7] Instead, the Rules which Spargo was charged with violating govern "ancillary political activity" that is

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7. Those provisions of the Rules prohibit judges or judicial candidates from making (1) "pledges or promises of conduct in office"; (2) "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court"; and (3) "any false statement or mispresent[ation about] the identity, qualifications, current position or other fact concerning the candidate or an opponent." 22 N.Y.C.R.R. §§ 100.5(A)(4)(d)(i)-(iii). This Court did not decide the constitutionality of such restrictions in *White*. *See* 536 U.S. at 773 n.5.

"in support of *other* candidates or party objectives." *Raab*, 100 N.Y.2d at 315, 793 N.E.2d at 1292 (emphasis added); *see* 22 N.Y.C.R.R. §§ 100.5(A)(1)(c)-(g). Because the Rules that plaintiffs challenge do not implicate the ability of a candidate to speak about her qualifications for public office, *see White*, 536 U.S. at 774, these provisions are "significantly distinguishable" from the restrictions invalidated in *White*. *Raab*, 100 N.Y.2d at 312-13, 793 N.E.2d at 1290; *see also Watson*, 100 N.Y.2d at 301, 794 N.E.2d at 6.

Petitioners also claim that the challenged Rules are void for vagueness. Pet. 26-29. *White* did not address vagueness and, in any event, the Rules provide ample notice of prohibited conduct, particularly when considered in light of the substantial body of case law authored by this Court, the New York Court of Appeals, the Commission, and New York's Advisory Committee on Judicial Ethics. Moreover, any judge or judicial candidate may request an advisory opinion about the propriety of specific conduct from the State's Advisory Committee on Judicial Ethics. *See* N.Y. Judiciary Law § 212(2)(l) (Consol. 2004); *see also Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) (statute not void for vagueness in light of availability of advisory opinion); *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974) (same).

IV. THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE SCOPE OF *YOUNGER* ABSTENTION

Even if this Court wishes to revisit the application of *Younger* to third-parties like McNally and Kermani, the decision below provides a poor vehicle for doing so. The Second Circuit expressed "substantial doubt as to whether plaintiffs have standing to seek equitable relief based

on the speech of other judges, and even if plaintiffs could demonstrate such standing, whether the controversy is sufficiently ripe for adjudication." Pet. App. 37 n.19. The court found that McNally and Kermani provided only "conclusory" and "speculative" allegations that they have "refrained from associating with and supporting other judges and judicial candidates because of the disciplinary charges against Spargo." *Id.* at 37 n.19. They failed to "identif[y] any other judges or judicial candidates who wish to engage in allegedly prohibited speech or political activity, nor does the record demonstrate that there is a likelihood of future disciplinary action against any judge or judicial candidate whom McNally and Kermani wish to support politically." *Id.*[8]

This Court's decision in *White* does not "control[]" the question of McNally's and Kermani's purported standing, as petitioners allege. Pet. 17. The parties to *White* never briefed that issue to this Court, nor did the Court pass upon it. In any event, had the Court *sua sponte* identified a defect in the standing of the non-candidate parties in *White*, it still would have been obligated to reach the merits in that case, because the standing of the candidate himself was uncontested and unquestionable. Nor is the Eighth Circuit's cursory standing analysis in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), on point. The Eighth Circuit found that non-candidates who wished to associate with a judicial candidate had standing to challenge Minnesota's judicial

8. Such speech from these unspecified judges or judicial candidates might actually be permitted by the Rules if it occurred during the "window period" around a campaign. *See* 22 N.Y.C.R.R. § 100.5(A)(2) (setting forth political activities that are authorized during the pendency, and for a short time following, a campaign for judicial office).

conduct rules based on evidence that they had in fact refrained from taking part in campaign activities for fear of subjecting the candidate to discipline. *Id.* at 860-61 & n.6. Here, however, McNally and Kermani have admitted that they freely supported Spargo and engaged in speech and associational activity related to his campaign, and their allegations as to their activities with respect to other judges or judicial candidates are entirely speculative. Pet. App. 37 n.19.

The Second Circuit concluded it would "decide [this] case under *Younger* without addressing the plaintiffs' constitutional standing to bring suit." Pet. App. 18. Should the Court grant certiorari and then determine that it is necessary to resolve McNally's and Kermani's standing before deciding the *Younger* issue, the Court would be required to do so without the benefit of any decision by the circuit court on this point.[9]

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9. In addition, the proceeding against Spargo involves one charge that rests in part on provisions of the Rules that Spargo has not challenged as unconstitutional. Specifically, Charge II alleges that while a sitting town justice, Spargo presided over criminal cases prosecuted by the Albany County District Attorney's office without disclosing to defense counsel that he had previously represented the District Attorney in a private capacity, and that he still was owed payment for those services. Pet. App. 7. Even if this Court were to grant certiorari and then conclude that abstention was not appropriate as to McNally's and Kermani's claims, the Commission could still proceed in the interim to adjudicate Charge II. Should that charge be sustained, the Commission could determine that Spargo be admonished, censured, or removed from office. *See* N.Y. Judiciary Law § 44(7) (Consol. 2004); 22 N.Y.C.R.R. § 7000.7(c). If Spargo were removed from the bench, the Rules no longer would apply to his speech or conduct, and therefore his constitutional challenge to the Rules would be rendered moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

THOMAS J. SPARGO, JANE MCNALLY, and PETER KERMANI,

Petitioners,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, Individually and as Administrator of the State Commission on Judicial Conduct and HENRY T. BERGER, Individually and as Chairperson of the New York State Commission on Judicial Conduct,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
I. PETITIONERS HAVE DEMONSTRATED A CLEAR CONFLICT BETWEEN THE SECOND CIRCUIT AND WELL-ESTABLISHED PRECEDENT FROM THIS COURT AND OTHER COURTS	2
II. THE CODE'S UNCONSTITUTIONALITY IS MANIFEST	6
III. THIS CASE PRESENTS A LEGAL QUESTION RIPE FOR REVIEW, SQUARELY PRESENTED TO THE SUPREME COURT	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Casa Marie v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) 4

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 1, 2

Hicks v. Miranda, 422 U.S. 332 (1975) 2, 3, 4

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 7

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868 (3d Cir. 1981) 1, 4

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 1, 7

Roe v. Wade, 410 U.S. 113 (1973) 8

Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.2d 65 (2d Cir. 2003) 2, 3, 4, 6, 7

Steffel v. Thompson, 415 U.S. 452 (1974) 8

Sullivan v. The City of Pittsburgh, 811 F.2d 171 (3d Cir. 1987) 4

Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission, 685 F.2d 974 (5th Cir. 1982) 4, 5, 6

FEDERAL STATUTES

Federal Rule of Civil Procedure 65(a) 9

PRELIMINARY STATEMENT

This Reply Brief is respectfully submitted on behalf of Petitioners Thomas J. Spargo, Jane McNally, and Peter Kermani in further support of their Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 9, 2003.

By erroneously holding the claims of the Petitioners to be "unavoidably intertwined and inseparable", the Second Circuit Court of Appeals made a determination in stark conflict with numerous other circuits and Supreme Court precedent on the issue of *Younger* abstention. Before making such a finding, this Court, as well as numerous circuits which have passed on the question, requires a relationship of "ownership, control, and management" *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975), or "an identity of economic activities and interests", *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 878 (3d Cir. 1981). Such a relationship has not and cannot be demonstrated among the Petitioners in this matter.

Not only was *Younger* abstention improper due to the complete and undeniable inability of Petitioners McNally and Kermani to participate in the challenged state administrative proceeding being pressed against Justice Spargo, abstention should not have been invoked as the challenged provisions of the New York State Rules of Judicial Conduct ("Code") were flagrantly unconstitutional, based not only on the recent opinion of the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), but

through a well-established body of First Amendment precedent.

This matter places squarely before the Supreme Court significant questions of law ripe for review, and the Petition for certiorari should be granted.

I. PETITIONERS HAVE DEMONSTRATED A CLEAR CONFLICT BETWEEN THE SECOND CIRCUIT AND WELL-ESTABLISHED PRECEDENT FROM THIS COURT AND OTHER COURTS

The Respondents have failed to cite a single case to support the position adopted by the Second Circuit's holding in *Spargo v. N.Y. State Comm'n on Judicial Conduct,* 351 F.2d 65 (2d Cir. 2003), or to demonstrate that the decision does not clearly diverge from existing precedent of the Supreme Court of the United States and other circuits on the subject of *Younger* abstention as it relates to non-parties to the challenged state proceeding. They have failed to cite a single case, and no such case exists, where *Younger* abstention was deemed appropriate and access to a federal forum denied to a litigant not party to a pending state proceeding, or unable to participate in that proceeding, or where a non-party did not have some relationship of privity or one approaching privity with a party to the state action. This failure is fatal to their position.

Contrary to the Respondents' contention, the Second Circuit *Spargo* decision did not "faithfully appl[y]" the precedent from this Court's decision in *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975), and *Hicks v. Miranda*, 422 U.S. 332 (1975). (Brief in Opposition, p. 8) In each of those

cases, a relationship of privity or one approaching privity existed, and the non-parties against whom abstention was invoked had some present ability to participate in the state proceeding. (*See,* Petition for Certiorari, pp. 7-21) In *Spargo*, this is simply not so.

Not only were Kermani and McNally not party to the state administrative proceeding, they were barred from participating in that process. Neither *Doran* nor *Hicks* can be cited to support the proposition that *Younger* abstention applies where the federal litigants were foreclosed from access to the state proceeding.

> As the Supreme Court made clear in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), where the plaintiff in a federal action is not a party to the state proceeding, *Younger* concerns about federal adjudication do not arise.

Sullivan v. The City of Pittsburgh, 811 F.2d 171, 177 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). Therein rests the fundamental flaw in the *Spargo* decision and the Respondents' opposition to certiorari.

The contention by Respondents that the relationship relied upon by the Second Circuit in abstaining "resembles the third-party claims in *Hicks*," (Brief in Opposition p. 8) is simply incorrect, and ignores critical factors present in the *Hicks* case demonstrating that a legally cognizable relationship existed between the non-parties and the parties to the state proceeding. Specifically, the non-parties employed the parties to the state proceeding. Moreover, the non-parties could seek recourse in the pending state proceeding. *Hicks*, 422 U.S. 348-49. To suggest that Kermani and McNally's relationship with

Spargo resembles the relationship among those in the *Hicks* matter is to ignore the relevant facts.

The attempts of the Respondents to reconcile the *Spargo* decision with decisions cited by Petitioners from the First, Third, Fifth, Eighth, and Ninth Circuits can best be characterized as sophistry, again accomplished only by ignoring critical aspects of each case. As discussed at length in the Petition, each of those cases held that "legally distinct parties . . . " would not be subject to the prohibitions to federal relief imposed by *Younger*. *Casa Marie v. Superior Court of Puerto Rico*, 988 F.2d 252, 267-68 (1st Cir. 1993); *Petition for Certiorari*, pp. 7-21. There is no sound basis to assert that the Petitioners are other than "legally distinct parties."

In fact, the Third Circuit decision of *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868 (3d Cir. 1981), and the subsequent Third Circuit decision of *Sullivan v. The City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987), specifically interpreted the *Doran* holding as requiring unitary treatment of parties for *Younger* purposes only where federal plaintiffs are closely related to state defendants in terms of "ownership, control and management," *New Jersey-Philadelphia Presbytery*, 654 F.2d at 878, or where there existed "an identity of economic activities and interests." *Id.; Sullivan v. The City of Pittsburgh*, 811 F.2d at 177-78.

The only new case cited by the Respondents in their brief in opposition, *Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982), does nothing to contradict the proof set forth in the Petition that a conflict among the

circuits has been created by the Second Circuit's decision in *Spargo*. Rather, a close reading reveals that the case is consistent with Petitioners' position that abstention requires some relationship of privity as well as the ability to meaningfully participate in the state proceeding.

In *Women's Community Health Center*, doctors and patients joined with a health center in an action arising from a challenge to denial of certification to the center pursuant to Texas' Health Planning Act. These doctors and patients worked or were seeking treatment at the Center. These plaintiffs also filed a suit in state court to review the denial of the certificate to the particular center. *Id.* at 977.

Moreover, the doctors and patients asserted no rights or claims distinct from the rights of that particular Center. They challenged the denial of the certification for that facility in that single instance; they did not challenge an independent basis or right to receive a particular type of medical services, in this matter abortion:

> The plaintiff women do not allege that the state might interfere with their ability to obtain an abortion anywhere but at the Center; the plaintiff doctors did not allege that the state might interfere with their ability to perform abortions anywhere but at the Center. The only relief requested is an order for the continued operation of the Center.

Women's Community Health Center, Inc., 685 F.2d at 982. Thus, the claim of the doctors and patients were identical to those of the Center.

This draws a clear distinction from the issues raised by the Petition where McNally and Kermani are independent parties, with independent claims, seeking to protect independent constitutional rights and freedom, regardless of Justice Spargo, as noted by the District Court. (App. p. 75).

The efforts to reconcile the *Spargo* decision with the various decisions from other circuits fail. The case upon which Respondents seem to heavily rely, *Women's Community Health Center, Inc.*, supports a grant of certiorari, serving only to highlight that the Second Circuit decision in *Spargo* was out of step with precedent on this issue.

II. THE CODE'S UNCONSTITUTIONALITY IS MANIFEST

The Respondents begin their opposition by misstating that "Spargo does not contest the Second Circuit's decision to abstain from adjudicating his own constitutional claims . . . " (Brief in Opposition at p. 1) Quite to the contrary, Justice Spargo clearly objects to abstention as to his claims for it was improper given the flagrant unconstitutionality of the Code. This is clearly articulated in the second Question Presented for review in the Petition for Certiorari and the nine page discussion of the Code's fundamental constitutional shortcomings of Point II.

It is submitted the Respondents wish to divert attention from consideration of the Code's constitutionality, as they are without sound legal arguments to support their position. The perfunctory manner in which the Respondents address the critical issue of the facial unconstitutionality of the Code in their opposition speaks loudly to this point. (*See,* Brief in Opposition pp. 16-17) Conspicuous by its

absence is any mention or discussion of the lengthy decision from the Northern District by Judge Hurd and the litany of First Amendment precedent cited therein demonstrating the facial constitutional invalidity of the challenged Code provisions. (App. pp. 83-84).

The flagrant unconstitutionality of the Code and its direct conflict with this Court's recent decision in *Republican Party of Minnesota v. White* are fully briefed in the Petition and will not be repeated here. (*See*, *Petition for Certiorari*, pp. 21-30)

III. THIS CASE PRESENTS A LEGAL QUESTION RIPE FOR REVIEW, SQUARELY PRESENTED TO THE SUPREME COURT

The Respondents, in a last gasp effort to avoid review of the flawed Second Circuit decision protest this case is a "poor vehicle" to revisit the application of *Younger* abstention to non-parties. In doing so, they ignore not only the clear conflict created by the *Spargo* decision between the various circuits and precedent of this Court, but the equally compelling basis for review – the presentation of a question squarely left open by the Supreme Court in *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). Contrary to the assertions in the Brief in Opposition, the Second Circuit itself, in deciding *Spargo*, acknowledged that *Middlesex County Ethics Commission* had expressly left open the question of the applicability of *Younger* to such as McNally and Kermani. (App. p. 32).

The Respondents also rely heavily on dicta in the Second Circuit decision questioning McNally and Kermani's standing, claiming the rights asserted are derivative of

rights held by Justice Spargo. (App. p. 37). The Second Circuit decision, however, did not decide standing (App. p. 37 n.19) and significantly the Respondents did not challenge the standing of McNally and Kermani to bring a direct constitutional claim. (App. p. 76 n.7). What Respondents ignore is that the District Court did reach the issue and did determine that McNally and Kermani had standing, raising separate and independent constitutional claims challenging the Code based on the First Amendment:

> . . . McNally and Kermani each assert individual claims that the challenged sections of the Rules chill their individual speech and association and are therefore unconstitutional. *See, Steffel v. Thompson*, 415 U.S. 452, 474-75, 94 S. Ct. 1209, 1223-24 (1974) (holding that on its face or as applied challenge will lie although there is no pending state court proceeding.) . . .
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> * * *
>
> Defendants have not challenged the standing of McNally and Kermani to bring a direct (as opposed to derivative) constitutional challenge to the specified Rules. Their facial challenge to the specified rules will lie since they have asserted that enforcement of the Rules has chilled their right to free speech and association. *See, id.*

(App. pp. 75-76, n.7).

Respondents also wish to make much of the Second Circuit's characterization of Kermani and McNally's claims of First Amendment infringement by the Code as "conclusory" and "speculative". This too is dicta, overlooking the District Court's determination that the two

asserted clear and distinct independent constitutional claims. (App. p. 75).

Also, it is critical to point out the posture of the case as it was decided by the District Court. The Record was comprised only of affidavits including those of McNally and Kermani, in support of the initial application for preliminary injunction. The District Court, however, consolidated trial on the merits with the preliminary injunction hearing under Federal Rule of Civil Procedure 65(a) maintaining the matter, at its core, constituted a facial attack on the Code's constitutionality determinable on the law. (App. pp. 58-59). Thus, there was no opportunity to expand the Record, as Petitioners were prepared to do, through testimony in open court. In any event, the District Court passed on the question and found facts sufficient to sustain that a separate and independent claim on the part of each existed. (App. p. 75).

In light of McNally and Kermani's claims, even the hypothetical scenario posited by the Respondents where charges against Justice Spargo based on non-challenged Code provisions are adjudicated before the Supreme Court hears the merits, would not serve to moot the case. In any event, even assuming that non-challenged charges were prosecuted to conclusion against Justice Spargo, the question would not be moot as it is clearly one encompassed in the exception to the mootness doctrine of a case "capable of repetition yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973).

It is submitted that the legal issues are clearly drawn, are of the type clearly within the ambit of this Court's review, and certiorari should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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